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THE UNIVERSITY OF ALBERTA

A PHILOSOPHICAL EXAMINATION OF CONTEMPORARY THEORY OF CONTRACT LAW

BY

GUANGWEI OUYANG

A THESIS

SUBMITTED TO THE FACULTY OF GRADUTE STUDIES AND RESEARCH

IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE

OF MASTER OF ARTS

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Roger A. Shiner
Supervisor

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ABSTRACT

In this thesis, I examine contemporary theory of contract law, that is, the normative legal philosophy currently in vogue. Over the last twenty years, the notion of "freedom of contract" has been criticized and legal positivism has been challenged. Legal philosophers are re-evaluating the foundation of law and the bindingness of contract. A first approach reinterprets the classical notion of promise with reference to social rules, moral principles, and a theory of entitlement. A second approach explains contract law as an instrument for maximizing economic efficiency and promoting distributive justice. A third approach criticizes the underlying ideology of existing contract law, and reconstructs a new model of contract law according to a set of communitarian values. Though these theories contain insights that have contributed to a better understanding of contractual obligation, they have provided less satisfying answers about the nature of contract law in general. In the light of hermeneutics their methodological inadequacies are criticized, and their foundational orientations are explored by means of a coherence theory. Through analyzing the "perspectives" and "functions" of a theory of contract law, I propose a comprehensive requirement for a contract theory, that it should serve three functions: prediction, explanation and justification. By discussing the "notions" and "relations" of a theory of contract law, I articulate a

coherence requirement for a contract theory, that it must define a set of basic notions and their relations within a holistic system. The thesis ends with a tentative framework within which the nature of contract law could be intelligibly discussed and might be comprehensively and coherently understood. The framework includes four notions: individual voluntariness, procedural legitimacy, moral fairness, and social justification. These notions correspond to the fundamental elements of contract law, and apply in certain relations, which include: the relation between core notion and sub-concept, between constant and variable notions, and between basic notions and their holistic system.

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A year ago, I took a course in "the philosophy of law" from Dr. R. Shiner. This thesis is essentially the result of my reflection upon topics raised during those classes. Without the generous help and suggestion from Dr. Shiner, this thesis would not have been possible. During the writing of this thesis, I had many stimulating discussion with Dr. Boetzkes, Dr. Hunter, Joe Mackenzie, and Tim Dare. Their contributions were invaluable.

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INTRODUCTION: THE EMERGENCE OF CONTEMPORARY THEORY OF CONTRACT LAW

During the last decade, interest in the jurisprudence of contract law has increased. Various theories of contractual obligation and some novel approaches to contract law have emerged. In this new theoretical climate, the orthodoxy of classical legal theories of contract has been challenged.

Classical legal theories take the law of contract essentially as but a legal institution based on promising. As defined by the Restatement, a contract is understood as "a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty."[1] To examine the theoretical foundation of the law of contract and to consider the origin of contractual obligation, classical theories focus on the nature of contract law through the notion of a promise.

Under the paradigm of classical contract theory, a promise is the original binding force of contractual obligation, but the notion of a promise is variously understood in terms of such criteria as a promisor's will, a promisee's reliance, and the contractual parties'

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[1] Restatement (Second) of Contract, Sec.1, 1979

consideration. Will theory maintains that commitments are enforceable because the promisor has 'willed' to be bound by his commitment, and " the will is something inherently worth of respect".[2] Reliance theory regards contractual obligation as an effort to protect a promisee's reliance on the promise of others. The bargain theory of consideration examines the manner in which promises produce an agreement and on that basis posits appropriate procedures for establishing contractual obligation. In short, viewed traditionally, the great bulk of the actual rules of the law of contract are regarded as depending on the intention of parties and certain legal procedures; the nature of contract law is implied in the notion of a promise, the form and substance of which creates the legal enforceability of contractual obligation.

One of the most important tasks for contemporary contract theories is to reexamine, to criticize and to justify the classical ideas of contract law, as well as traditional legal reasoning and doctrinal analysis in general. It is widely acknowledged by almost all of the recent legal theories that it is impossible to understand the nature of contract law, if a contract theory is based on an analysis of individual intentions and certain abstract rules without considering their underlying moral

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[2] Cohen, "The Basis of Contract", 46, Harvard Law Review, p. 553, 1933.

principles and the social context in which those contractual models operate. In other words, "To be enforceable the promise must be accompanied by some other factors ... . The question now to discuss is what other factor, what fact or facts must accompany a promise to make it enforceable at law?"[3]

In order to answer the question, contemporary theorists of contract law are reconsidering the foundations of the law of contract and the origin of the bindingness of contractual obligation. Consequently, there appears a lot of different theories of contract law. Prominent among them are: the "social rule" theory of contract (P. S. Atiyah), the new "will" theory of promissory obligation (C. Fried), the "consent" theory of contractual obligation (R. Barnett), the theory of economic efficiency (R. Posner), the theory of distributive justice (A. Kronman), and critical legal theory (D. Kennedy and H. Collins). The emergence of these theories signals a new period of legal study of contract law. On the one hand, they reflect the transition from the classical role to the modern role of contract law in society, and express the evolution from a laissez faire notion of "freedom of contract" to the notion of social interference in "free contract". On the other hand, the very differences between these theories of

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[3] A. L. Corbin, Corbin on contracts, section 110, p.490 (1963)

contract serve to deepen our understanding of the problems surrounding the nature of contract law and to increase extensively our knowledge of the range encompassed by the law of contract. In this sense, contemporary contract theories have provided the possibility of understanding the nature of contract from multi-perspectives.

However, there is still a long way to go from the possibility of understanding to the actuality of understanding the nature of contract law. The modest task of this essay is to assess these recent contract theories, and on that basis to provide a tentative framework within which the nature of contract law could be intelligibly discussed and debated, and it might be understood comprehensively and coherently.

In the first three chapters, seven distinct theories of contract will be examined and evaluated in some detail. What I am going to show is that each of these theories contains insights that have contributed to a better understanding of various aspects and characteristics of contract, but that on the whole they have provided less satisfying answers about the general nature of contract law, such that none of them alone could supply a comprehensive and coherent understanding of contractual obligation. These seven different theories will be classified into three distinct approaches: the promise reinterpretation approach (chapter I); the economic ground

approach(chapter II); the critical legal approach(chapter III). At least partially, each theory's weakness stems from methodological deficiencies that are inherent to its type. By presenting and evaluating the three approaches, I intend to show what is going on in the contemporary jurisprudence of contract law and what are its major problems.

Chapter IV is meant to give a philosophical reflection on contemporary theories of contract law. On the one hand, a general methodological problem in theories of contract will be explored in the light of a hermeneutical approach. That is, each of the recent theories starts with a single-perspective approach to interpreting the whole nature of contract law, and carries with it overly narrow functions upon which to understand complex contractual activities. On the other hand, a new tentative framework of contract theory is articulated in terms of a coherence approach. This framework is not offered as a determinate theory , but rather as a meta-theory of contract law, upon which the possibility of and requirements for a comprehensive and coherent theory of contract are put into proper perspective, so that the various theories of contract might be intelligibly debated.

CHAPTER I PROMISE REINTERPRETATION APPROACH

Theories under this classification are those that start with reexamining the classic theory of contract law and reinterpreting the notion of a promise. Theorists of this approach assume that a contract is simply a promise that the law will enforce.[4] This concept of contracts as a subset of promises is implicit in most legal thinking about contracts, but receives an explicit expression in a recent work by Fried. He says: "[S]ince a contract is first of all a promise, the contract must be kept because a promise must be kept."[5] Departing from the classical interpretation of a promise which is some sort of subjective intention, modern theorists try to reinterpret or justify the notion of promises, and intend to work out other sort of elements underlie the notion of promising, which essentially give rise to a promise as the core of contractual obligation. In other words, they attempt to provide some theoretical

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[4] See, e.g., Restatement (Second) of Contracts Section 1, (1979); P.S.Atiyah, Promise, Morals, and Law, (Clarendon Press, Oxford, 1981); C. Fried, Contract as Promise: A Theory of Contractual Obligation, (Cambridge, Massachusetts, Harvard University Press, 1981); R.E.Barnett, "A Consent Theory of Contract", Columbia Law Review, Vol.86, 1986, p.269; and most of modern text books on contract law.

[5] C.Fried, supra note 4, p.17

foundation for the notion of a promise. Accordingly, the common formula for the promise reinterpretation approach is that "A promise is a sufficient condition for contractual obligation, provided X (something else)". X varies from one theory to another. For Atiyah, X is a social rule. For Fried, X is a moral principle. For Barnett, X is a mixed notion of consent. Based on their different concerns, they give various interpretations of promises and so establish different frameworks for contractual obligation.

1.1 The Social Rule Theory of Contract

The social rule theory of contract is articulated by Atiyah in his books Promises, Morals and Law and Essays on Contract.[6] Social rule theory maintains that there must be some social rules underlying promissory obligation. As Atiyah puts it in a clear way, "All I assert is that it is not possible to give a coherent explanation of why promises should be morally binding unless one first posits a social context, within the framework of which obligation arise."[7] That is to say, bare promising creates no contractual obligation, and the notion of a promise is meaningful for legal obligation only when we first assume a certain social

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[6] P.S.Atiyah, Essays on Contracts, (Clarendon Press, Oxford,1986)

[7] Atiyah, supra note 4, p.127

context.

The notion of a bare promise in Atiyah's context refers to two ideas. First, it means an individual will or a subjective intention. In this sense, the meaning of a bare promise is correspondent to the classical interpretation of a promise. Second, it implies a moral obligation. In this sense, the meaning of a bare promise is similar to Fried's interpretation of a promise. By these two meanings of a bare promise, Atiyah on the one hand refuses the classical legal subjectivism, and on the other, he criticizes Fried's theory of promissory obligation and claims that a promise, per se, does not create moral obligation.[8]

According to Atiyah, on the one hand, none of the existing utilitarian or other contract theories' accounts of contractual obligation is satisfactory. In Atiyah's view, the existing theories could be divided into two types: internalism and externalism in terms of methodology. Internalism, exemplified by intuitionism, tends to hold that the sources of promissory obligation can only be found within the notion of a promise. The internalist correctly sees the notion of promising as the basis of moral obligation, but he fails to recognize that morality itself is a form of social regulation on a par with the law and

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[8] Atiyah, supra note 3, p.123-129; also see Atiyah, supra note 6, essay 2 and essay 6.

therefore it needs further justification. Externalism, represented by utilitarianism, assumes the dependence of promissory obligation on some sort of social basis, e.g., utilitarian values. But the utilitarian lacks an explanatory force for accounting for promissory obligation and for distinguishing a promise from a mere subjective intention. Furthermore, in order to justify the utilitarian value, we might be involved in infinite regress.

On the other hand, Atiyah thinks, current theories and practices are more or less still dominated by the classic notion of promising. That is, "contractual obligations came to be treated as being almost exclusively about promises, agreements, intentions, act of will. The function of the law came to be seen as that of merely giving effect to the private autonomy of contracting parties to make their own legal arrangements."[9] This orthodoxy is certainly a product of a nineteenth-century heritage (classical economics, Benthamite radicalism, liberal political ideals). In order to establish a new understanding of contractual obligation, in Atiyah's view, the old foundational notion of promising must be criticized and reinterpreted.

There are many difficult problems at the borderline of the notion of promising. First, from the perspective of definition, the concept of promising has no identified meaning. It is not clear what sort of criterion can be used

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[9] Atiyah, supra note 6, p.10-11

to determine what a putative promise "really" is or how it is to "count as " a promise. If a "promise" is neither communicated, nor related to a matter of fact, (in other words it is a bare promise), is it really a promise? Second, from a descriptive perspective, a bare promise creates no legal obligation. It is an historical fact that a promise with legal enforcement is always based a moral or social consideration. When people feel extremely dubious as to whether there exists a moral or social obligation, a putative promise is always regarded as creating no legal obligation. This point naturally leads to the third, that from a normative perspective, there is no reason to affirm that all promises ought to create legal obligations without looking the underlying principles behind them or without observing the consequences after them. When these underlying principles are considered, "the promise itself may then turn out not to be capable of generating an obligation of its own force."[10] Finally, the notion of promising is too narrow to explain the origin of contractual obligation. The presuppositions of the model assume that "contract law is fundamentally about what parties intend, and not about what they do,"[11] and maintains that a contract "has some kind of objective existence prior to any performance or any act of

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[10] ibid. p.4

[11] ibid. p.14

parties."[12] These presuppositions not only put the law of contract on the subjective foundation of parties' intention and will, but they also regard the law of contract as a relationship within defined and limited parameters (two parties). Other parameters such as fairness, justice, morality, and especially reliance are excluded.

Since bare promising creates no obligation, a more fundamental question is raised, namely, Is there any moral purpose behind promising? With regard to the moral basis of promising, there are two diametrically opposed methodological positions: internalism and externalism. By internalism, Atiyah means to "think that the object of moral inquiry is to assist those who seek guidance as to the 'right thing to do'." By externalism, he means to "observe moral rules, why it is socially desirable or necessary that moral rules should exist and be respected."[13]

According to Atiyah, the internalist approach to contractual obligation is hopeless although it tries to find a moral basis for promising. Atiyah argues that morality and law are entangled with each other. "If the moral principle that promises ought to be kept... serves similar purposes to the legal principle that binding contracts must be performed, then the law can not be

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[12] ibid.

[13] Atiyah, supra note 4, p.123

justified by pointing the moral rule."[14] The whole problem for internalism is that it fails to recognize morality itself as a form of social regulation on a par with the law. Hence, within the internalism, the explanation of contractual obligation appears to involve either an infinite regress or a petitio principii. In order to avoid the internalist predicament, we have to assume that something must be behind both the law and morality. This is what Atiyah calls the social context.

It is noted that Atiyah does not simply emphasize the social context in promissory obligation; rather he requires that there must be a social rule, determined by the social context, underlying promissory obligation and legal as well as moral rules of promising. Strictly speaking, the real origin of promising obligation consists in the social context, or, say, in the relationship between legal rules and social rules, as well as in the relationship between moral rules and social rules. The social rules initially determine the ascription or distribution of entitlement of the contractual parties. The social context, as an invisible hand, has permeated our law and morality. Social rules, as a visible enforcement, predetermine the purpose and the dimension of legal rules and moral rules.

Thus viewed, the traditional and internal model of contract theories should be rewritten. The classical model

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[14] ibid.

(promising is a sufficient condition for contractual obligation) and the internal model (moral purpose is a sufficient condition for contractual obligation) should be replaced by the new formula, that is, X is sufficient for contractual obligation, provided there are underlying social rules. Here X stands for various factual and individual conditions which may be involved in contract law.

Atiyah's contribution is to provide a general and abstract relationship between legal rules and social rules by highlighting the determinate role of the social context in the justification of promissory obligation. But a more crucial and subtle question still remains, that is, How do social rules determine moral rules as well as legal rules? Unfortunately, Atiyah tells us almost nothing about what and how social rules actually function in creating promissory obligation. It seems to me that the questions of "what" and "how" are so crucial that Atiyah could not create a complete framework of contract theory without giving these answers first. Thus, we have to be suspicious that the shortcoming of his theory is not Atiyah's accidental negligence, but is rooted in his approach.

Atiyah's external approach is primarily opposed to an internal one which disregards the social context in explaining the nature of promissory obligation. Superficially these two approaches seem quite different.

Internal explanation appears as a circular argument from legal rules to moral rules, while external argument steps outside the internal viewpoint and take account of the social dimension. The issue in question is that what we need for understanding contractual obligation is at least to build a relation between legal and moral rules on the one side and the social rules on the other side. If the interaction between them is not clear, and if the relation between them still remains speculative, then the difference between internalism and externalism is not important. To put it another way, the discrepancy between the internal and the external approach is only an epistemic issue; that is, it is only a question as to which aspect of contract law we start from to understand the nature of contractual obligation. Just as bare promising cannot create an obligation, a bare social rule cannot do it either. In this sense, too much stress on social rules makes same mistake as overemphasis on legal rules or moral rules.

1.2 The New Will Theory of Promissory Obligation

The classical will theory of contract, based on the notion of contract as promise, regards contractual obligation as essentially will-bound, party-intended, and self-imposed. In the last half-century, the jurisprudence of contract has been hostile to the will theory of

contract. The concept of contract as a promise has been challenged and the idea of self-imposed obligation has been attacked. The new will theory of contract is an attempt to reinterpret the classical will theory and to justify the law of contract from a liberal point of view. Fried claims in his Contract as Promise, "I begin with a statement of the central conception of contract as promise. This is my version of the classical view of contract proposed by the will theory and implicit in the assertion that contract offers a distinct and compelling ground of obligation."[15] What is novel about Fried's thesis is his defence of the main structure and doctrines of traditional contract law by reference to the "promise principle", that is, contracts are binding on individuals and promising alone provides a sufficient basis of obligation.

Fried's arguments include two steps: first, to clarify the "promise principle"; second, to apply it in various areas within the law of contract. Let us start with his key notion of contract as promise. The foundation of Fried's account of contractual obligation is a deep-rooted classical liberal individualism in combination with Kantianism.[16] The liberal individualism emphasizes that individuals are autonomous and free, and it requires

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[15] Fried, supra note 4, p. 5-6

[16] This idea is explicitly expressed in Fried's early works. See, Anatomy of Values: Problems of Personal and Social Choice (1970), and Right and Wrong (1979)

respect for the person, the property and the choices of others. Kantianism provides a moral principle of duty that distinguishes between what is right and what is good and that judges the moral quality (right and wrong) of an act independent of its consequence.[17]

The liberal idea of individual autonomy and the moral principle of self-determination are applied to the law of contract, and lead to a "crucial moral discovery", that is, morality could be enlisted not only to assure respect for one's self and property, but also to assure that by trusting each "free man may yet freely serve each other's purposes."[18] Fried regards this moral discovery and the notion of trust, as the very foundation of promissory, and therefore, contractual obligation.

This moral discovery provides Fried with a foundation for reinterpreting the notion of a promise as a moral "promise principle". According to Fried, a promise is not a mere communication of intention, which we are free to change, though others may be injured. "A promise invokes trust in my future actions, not merely in my present sincerity."[19] A mere promise commits a person to a future course of conduct, because promising, existing on the same

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[17] For Kant's idea of the duty to keep a promise, see I. Kant, Foundation of the metaphysics of Morals, (Trans. by L.W. Beck, 1959), p.48

[18] Fried, supra note 4, p.8

[19] ibid. p.11

structural level as games or language is a "general convention".[20] A general convention endows a promise with a moral enforcement; that is, people assume that promises have force in general to bind them to future conduct, and apply this conventional understanding to particular cases. Therefore, promises give us the means to accomplish our will through a moral power alone, transforming a choice that was morally neutral into one that is morally compelled, and permitting us to gain the cooperation of others to achieve our purpose.[21] Note that there is a difference between Fried's convention and Atiyah' social rules. The former mainly refers to a moral binding force, and is more like the Kantian notion of moral imperative or human moral structure; whereas the latter refers to a certain social context, which is the final foundation of moral and legal activity.

Under the requirement of morality, Fried rejects the view that a person becomes morally obligated to keep his promises merely because of external sanctions, such as self-interest or consideration of utility. An utilitarian theory of contract judges whether an act is moral or not according to the result of the act, and a self-interest view of contract relies on individual benefit or advantage beyond moral considerations. The essential problem for both

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[20] ibid.

[21] ibid. p.8

theories is that they fail to take persons seriously as moral beings and are therefore incompatible with the moral roots of contract. Contrary to the view of external sanctions, Fried asserts that "an individual is morally bound by his promise because he has intentionally invoked a convention whose function it is to give grounds --- moral ground --- for another to expect the promised performance."[22] Thus viewed, it is a moral wrong to appeal to a convention in order to secure a promise and then to break it, because it means to betray the trust and the respect for individual autonomy on which a convention is based.

In sum, "[T]he contract must be kept because a promise must be kept."[23] This conclusion about the origin of contractual obligation is derived from liberal and Kantian ideals, which lead to a moral discovery and result in the genesis of promising as a convention.

As the conceptual framework of contract law is established, the rest of Fried's work is to apply the framework to illuminate concrete areas of the field, including the doctrine of consideration, the rules of offer and acceptance, the consequence of mistake, the nature of duress and unconscionability, and the theory of condition. However, one important difference between the classical

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[22] ibid. p.16

[23] ibid. p.17

theory and the new will theory still remains. In Fried's view, the fatal mistake of the classical will theory is its "far more rigid approach than the theory of contract as promise requires."[24] That means, the advocates of the will theory not only assume that the promise principle occupies an exclusive position in the law of contract, but they also try to provide the final explanation for every feature and rule of contract law. They are really trying to prove too much.

By contrast, Fried argues for the dominant position of the promise principle in contract law. Thus, he divides traditional topics of contract law into three groups. In the first topic of remedies and formation, Fried produces arguments in each case to show that the rationale for the legal treatment of these areas lies primarily in the moral basis of promising. In the second topic of mistake and frustration, he recognizes that principles other than the promise principle are legitimately at work in the law of contract, but these principles are interpolated by retaining "loyalty to the promise itself --- the faithful carrying out of the mutual promises that the parties, having come to understand their separate purposes choose to exchange."[25] In the third topic of duress and unconscionability, he concedes that there are some cases

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[24] ibid. p.6

[25] ibid. p.88

which do not conform with the promise principle and even contradict it. But he argues that our moral intuitions do not approve of these cases. In other words, these doctrines in "contract law" are without justification, and these features of what lawyers call "contract law" must be explained in terms of noncontractual legal theory.

If Fried's arguments really try to prove the dominant position of the promise principle in the law of contract, there is less significance in examining the first topic (which is founded on the promise principle) and the third topic (which , if we accept Fried's judgement, falls outside contractual theory), because in each case, the promise principle is actually regarded as the first and foremost criterion (if not the only one) to evaluate whether a contract is obligatory, and whether something is a contract. From the consideration of these two cases, the features which are explicable on the promise theory model belong to contract law: the features not so explicable do not. The features which are explicable in terms of contract as promise belong to contract law; the features which are not explicable in terms of contract as promise do not belong to contract law. If Fried strictly follows his definition of a contract, and if Fried rigidly uses his promise principle to explain all cases, then there is no incoherence in his theory. The most likely and the strongest criticism would concern the scope or

comprehensiveness of contract law. As Atiyah remarks in his review, "There are rather more circumstances in which the presumption (the promise principle) is rebuttable ...".[26] So the features of contract which Fried concedes are not covered by the promise principle constitute in fact the vast majority of the law of contract.

The most troublesome and the crucial question for Fried is in the second topic, that is, in those circumstances where both the promise principle and other principles are legitimately at work. What is the relation between them? Does each of them have a different moral (or something else) foundation? Or is one subject to the other?

These problems arise when Fried examines what he calls "gaps" in the contracting process by discussing mistake, impossibility and frustration. Fried refers to three cases in which the parties have not agreed on something, and perhaps have not even thought about it, or when their apparent agreement was predicated on a mistake they both made. In all these cases, "The straightforward point is that the two parties, though they seem to have agreed, had not agreed in fact."[27] According to Fried, mistake, frustration and impossibility cannot be resolved on the basis of any agreement or promise. So in order to deal with these problems, courts must look to principles external to

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[26] Atiyah, supra note 6, p.148

[27] Fried, supra note 4, p.59

the will of the parties, by means of which to unmask what was really happening. The classical will theory provides two alternative principles, which are the doctrine of presumed interest and the objective theory of interpretation.[28] Fried is not satisfied with either of them. He thinks that it is simply irrational to ignore the gaps in contract and refuse to fill them on the one hand; on the other he concedes that "The gaps cannot be filled, ... by the promise principle."[29] So the only alternative is to find some principles other than that of the classical theory. Those new principles are called "residual general principles of law",[30] such as the tort principle of compensation for harm done, the principle of restitution of benefits conferred, and the principle of sharing.

It is obvious that Fried recognizes that the main weakness of the will theory of contract law lies in its attempt to reduce the whole of contract law to the will of the parties. In order to avoid this shortcoming of the will theory, Fried tries to make his version more acceptable by recognizing the limitations of the promise principle and admitting that there are many gaps in the law of contract that must be filled by nonpromissory principles of justice. Mistake, frustration and impossibility highlight "the

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[28] ibid. p.60-61

[29] ibid. p.69

[30] ibid. p.69

inevitability of using noncontractual principle to resolve failures of agreement."[31] Similarly, failure to agree at all may require the application of nonpromissory reliance principle, as in Hoffman v. Red Owl Stores, Inc.,[32] whereas failure to perform may require the use of restitutionary principles, as where a landowner pays in advance an oil well driller who fails to drill, and it then becomes clear no oil lies beneath the land.[33]

Two problems are involved in this artificial distinction between the promise principle and nonpromissory principles, namely, what the relation is between these two distinctive principles and what the foundation is for each of them? The distinction between the promise principle and residual principles is entirely ambiguous, or else, Fried's treatment of nonpromissory obligation seems inconsistent with his overall project. Fried tries to propose a systematic theory of contractual obligation which is based on the moral notion of contract as promise. But the promise principle as the foundation of his theory cannot cover entirely some areas of contract law, or even has nothing to do with these areas. It is obvious that nonpromissory principles now govern many of the cases treated in the traditional contracts course. If Fried insists on the idea

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[31] ibid. p.61

[32] ibid. see the example, p.24-26

[33] ibid. See the example at 114-116

of contract as promise, then "the death of contract" proposed by Grant Gilmore will be the necessary conclusion of contract law. If Fried tries to rescue the life of classical contract law, then he should abandon his promissory principle. In either case, Fried has to face a dilemma.

The promise principle and "residual principles" have a different theoretical foundation. The former is based on classical liberal and moral principle, whereas the latter is founded on the legitimacy of the institution of social justice. The evolution of the law of contract has shown that individual free choice is increasingly circumscribed and directed by an ever-expanding body of statutory enactments. In this sense (maybe from Atiyah's view), the promise principle itself may be of but "residual value", because it is only an instrument for fulfillment of some wider social goal.

In short, the contribution Fried makes is that he explores the function of promising as a moral principle in creating contractual obligation; the question Fried leaves to us is the proper relation of this moral feature with other features of contract. The lesson we get from Fried's approach is as Atiyah summarizes: given the diversity of the law of contract, "there is no hope of reducing the whole body of contract, or even its main outlines, to a

single principle."[34]

1.3 The Consent Theory of Contractual Obligation

To some extent, Barnett's consent theory, in his essay "A Consent Theory of Contract",[35] is an attempt to synthesize Atiyah's and Fried's approaches. On the one hand, he applies the notion of social roles into his concrete framework of the consent theory, and on the other, he attempts to give a moral justification for the obligation to keep a contract. As a result, Barnett claims , the consent theory provides a relatively comprehensive understanding of the nature of contractual obligation from a more overarching approach that can capture the truths of other theories while avoiding their errors.[36]

Barnett presents his arguments as follows. Firstly, he systematically criticizes three types of classical theories of contractual obligation (party-based, standard-based, process-based). Barnett tries to show that the vital weakness of the three types of promise theory is a "lack of a consensus concerning the proper basis of contractual

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[34] Atiyah, supra note 6, p.149

[35] See supra note 4

[36] Randy E. Barnett, "A Consent Theory of Contract", Columbia Law Review, Vol. 86,(1986), p.269

obligation".[37] Then, Barnett articulates his consent theory with two fundamental concerns. One is a legal theory of entitlement, which is the foundation of contract law, and the other is the moral notion of consent, which is to him the origin of contractual obligation. Finally, Barnett shows the special strengths of his consent theory with respect to sucess in problem-solving. In this section, I will first present the consent theory, and then the problems with the theory will be discussed in some detail.

At the very beginning of his essay, Barnett claims that the task of legal theory is normative. " We look to legal theory to tell us when the use of legal force against an individual is morally justified. We look to contract theory, in particular, to tell us which interpersonal commitments the law ought to enforce."[38] A normative approach, which does not refer contract law only to the sum total of statutes actually enacted and regulations and to the actions of judges, i.e., the system of rules, requires some fundamental concerns which are behind the contractual rules. These concerns might be the social context (Atiyah), moral principles (Fried), and legal entitlement (Barnett).

Based on a normative approach, Barnett says, "laying the theoretical foundation for the actual application of

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[37] ibid. p.270

[38] ibid. P.269

this approach would require a two step analysis."[39] The first step is meant to introduce a relevant normative theory --- in Barnett's case, an entitlement-based theory is deployed as a theoretical background for a contract theory. Barnett says, "The first step would be an inquiry into rights: what rights do we have, which of them are alienable, and by which means are they alienated ?"[40] Any coherent theory of justice based on individual entitlement, according to Barnett, must contains a tripartite definition of entitlement in acquisition, use and transfer. The entitlement theory of law therefore consists of three parts: property law focuses on the issue of initial acquisition of entitlement in real resources. "Tort law concerns the protection of and proper limits on resource use; and contract law deals with transfers of rights between right holders."[41] In addition, each type of law contains principles of rectification for the breach of legal obligations.

If contract law is defined as dealing with a transfer of individual rights, then the question of enforceability in contract law will turn into more fundamental issues, "what rights individuals have and the manner by which they

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[39] Randy E. Barnett, Contract Scholarship and the Reemergence of Legal Philosophy, Harvard Law Review, Vol.97, 1984, P.1242

[40] ibid. P.1242

[41] See supra note 36, P.292

come to have them."[42] In other words, an understanding of contractual obligation (including principles of contract law, and the process of contractual transfers) would require an appeal to some underlying principles rather than merely some internal concerns (such as will, reliance, fairness, and various contract rules).

Generally speaking, Barnett says, individual rights could be divided into two types, alienable rights and inalienable rights. "A consent theory acknowledges that substantive concerns arising at the level of entitlement--- for example, a distinction between alienable and inalienable rights --- can effect the enforceability of certain commitments."[43] That is to say, which type of rights agreements transfer will be of crucial significance in identifying the enforceability of contracts. Only alienable rights could be the subject-matter of valid and enforceable contracts, whereas agreements to transfer an inalienable entitlement will have no binding nature in law and morality. The idea of contract law as dependent on rights theory, it seems to me , could possibly implicate more comprehensive social and historical contexts than Barnett imagines, for the criterion for determining what rights are alienable or inalienable is varied in different societies, and is affected by various elements. We will

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[42] ibid.

[43] ibid

turn back to this question later.

Viewed from an entitlement approach, contract law is a body of general principles and specific rules the function of which is to identify whether the rights of individuals are alienable or not, and thereby indicate when legal force may legitimately be used to preserve those rights and to rectify any unjust interference with the transfer process.[44] By the first step of analysis, Barnett has shown that individual entitlement as the root of contractual obligation is a necessary condition for making a contract. However, the question of making a contract is not equivalent to the question why a contract has legal and moral obligation, although these two questions are related. The key point for a binding contract is the way by which the individual rights transfer.

According to Barnett, the question of indicating the manner of a valid transfer of right is not only a question of legal obligation, but also a question of moral obligation. The legal obligation is founded on a more comprehensive background of moral obligation. To fully understand contractual obligation, legal philosophy must identify circumstances when legal enforcement is morally justified. An entitlement theory of law requires that contractual obligation should be justifiably enforced only as a result of moral analysis to derive individual legal

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[44] ibid. P.295

rights. It is in this sense, that the theory of contract law is the theory of when courts are justified in enforcing a transfer of alienable rights.

To answer the question of what the moral requirement of contractual obligation is, we must enter the second step of analysis. "The second step would be an analysis of what constitutes a manifestation of consent sufficient to indicate the presence of a contract."[45] Barnett emphasizes everywhere in his essay that the unique strength of the consent theory is its root in the theory of individual entitlement. That is to say, the analysis of the moral notion of consent is based on the analysis of the legal theory of entitlement. According to an entitlement approach, there is a difference between rights in acquisition, use and transfer. Therefore, it is necessary to separate moral principles governing the rightful acquisition and use of resources from those governing their transfer. In the case of property law, the rights to acquire resources is an unowned one. In the case of tort law, a person who interferes with another's rights is said to "forfeit" rights to resources. Therefore, both cases have nothing to do with the notion of consent. Only in the case of contract does law concern "enforceable obligations arising from the valid transfer of entitlement that are already vested in someone, and this difference is what

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[45] See supra note 39, 1242

makes consent a moral prerequisite to contractual obligation."[46] Based on the broad theory of entitlement, consent is to be taken as a moral component and a moral criterion that distinguishes valid from invalid transfers of alienable rights in a system of entitlements.

In the second step of analysis, Barnett tries to give a new interpretation of the notion of consent, and to explore the function of consent in contractual obligation. From Barnett's view, most of the recent contractual theories produce a subjective-objective dichotomy (such as the will theory and the reliance theory), while "a consent theory's recognition of the dependence of contractual obligation on a rights analysis is able to account for the normal objective-subjective relationship in contract law."[47] Being different from the consent theory, the will theory bases contractual obligation on a subjective intention of making a contract. Consequently, contractual obligation can not be justified in the absence of an actual contract, or, at least, actual expression of will. In opposition to the subjective approach, Barnett defines consent as a objective and manifested assent.[48] The new definition emphasizes objectively manifested intention, "which usually reflects subjective intent, [and

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[46] See supra note 36, P.297

[47] ibid. P.301

[48] ibid. P.304

so] provides a sounder basis for contractual obligation than do subjectively held intentions."[49] According to Barnett, consent, if understood as a subjective intention, only exists in an individual mental state and thus it is extrinsic to the transaction. As consent is regarded as an objective manifestation of an intention to alienate rights, it objectivizes the subjective intention and thus it is intrinsic to the transaction.

A consent theory also explains the limits of the objective approach. The reliance theory takes contractual obligation as being bound by the common meaning of contractual parties regardless of their intention.[50] In this sense, the reliance theory accounts to being "objective". A pure objective approach has difficulty in explaining a difference of subjective understanding by contractual parties and of the generalized meaning of contract. Any misunderstanding between two parties for various reasons could cause the transfer of alienable rights to be invalid. One solution Barnett offers is to define consent based on the accordance of an intended meaning and generally prevailing meaning. "In a consent theory, reliance on the words or deeds of another is 'justified' only (1) when and to the extent that such words

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[49] ibid.

[50] Barnett, supra note 36, p.274; also see Gilmore, supra note, p.71-72 about reliance principle; also see Atiyah, The Rise and Fall of Freedom of Contract, 6, p.779

or deeds have a commonly understood meaning within the relevant content ... and (2) when this meaning indicates a consent to transfer legitimately acquired and alienable rights."[51]

Under the new definition of consent, Barnett claims, a consent theory requires that legal enforcement of transfer is morally justified when the contractual parties voluntarily performed acts which have conveyed their intentions to create legally enforceable rights, and where 'conveying intentions' is something which has public criteria; the court is justified in enforcing a transfer of entitlement when contractual parties have both antecedently manifested consent to the transfer of each individual entitlement. So, because each party has to consent, there is an element of subjectivity. But because public standards for what counts as consent are used, there is an element of objectivity.

In presenting the consent theory of contractual obligation, we have shown its various merits. Prominent among them are the reconciliation of the subjective and objective aspects of contractual obligation, the combination of the external and internal approach to explaining contractual obligation, the accordance of legal and moral obligation, and the theory's special ability to solve problems which other theories fail to solve.

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[51] ibid. P.307

At the beginning and at the end of his essay, Barnett quotes twice Kuhn's criteria for evaluating a theory---which theory among the competing theories will solve more problems. By this standard, the consent theory obviously should be considered a more valuable approach than others. If we change the criterion for evaluation, we might go further to ask, Why could the consent theory solve more problems than the other theories? Does it advocate something radically different to explain contractual obligation? To use Kuhn's term, does the consent theory invoke a 'paradigm change' for understanding contractual obligation?

The consent theory may have an ability to solve more problems than other theories, because Barnett absorbs much from other theories into the consent theory. On the one hand, the consent theory as an external approach is based on a broad theory of entitlement, which is essentially an application and development of Atiyah's "social rule " theory. What Barnett does in his theory is to concretize the idea of social rule and to concentrate on the broad background of legality and morality. On the other hand, the consent theory, as an internal approach, is founded on the broad notion of consent, which includes most of the other contractual elements. The notion of consent takes 'will' or intention as its subjective part, and regards 'reliance' as its objective aspect. Promise is the consensual component

and bargaining is the evidence of consent. Briefly, the notion of consent is almost equal to the notion of contract , which, of course, also includes all those elements. It is in this sense that the consent theory of contractual obligation contains an unique strength. What Barnett discusses under the name of consent has been already implied in the notion of contract, and what Barnett does is to make the notion of consent equivalent to the notion of contractual obligation. Unfortunately, the argumentation does not merely bring Barnett's theory some advantages, it also results in some vital weaknesses in his theory.

The argument above shows that what Barnett really intends is to argue consent as a necessary and sufficient condition for contractual obligation. But what he could actually prove is that consent is a necessary condition for contractual obligation. We can say, for example, courts are not morally justified in enforcing a transfer of right without the consent of contractual parties, or there is no contractual obligation without the notion of consent. But we can not say that a contract is enforceable if it is solely depended on consent. Because, according to Barnett, it is not merely consent but also consent to transfer an alienable right which allows a committment to become a legally binding contract. If this is the case, the courts first need to justify the objects of an exchange and then to identify whether there is a manifestation. It is in this

sense that consent is not a sufficient but a necessary condition for contractual obligation.

If Barnett still wants consent to be a sufficient condition for contractual obligation, then one way to do that is to put the theory of entitlement into the notion of consent. But even so, it still remains the question that the theory of entitlement must rely on, or, put in a modest word, relate to some other fundamental concerns. If this is the case, the theory of entitlement can not determine by itself which kinds of rights are alienable or inalienable. In fact, the initial idea in introducing the theory of entitlement is to respect the constraint of social rules. The question is that, as to social context, there are more aspects (or elements) as the root of contractual obligation than just rights --- i.e., political, moral, cultural, economic, national, international, ideological and conventional elements. If the consent theory is a sound theory, the <u>unique</u> and <u>essential</u> relation between the theory of entitlement and the notion of consent must be explained, and the contractual parties have to be individuals as pure right-holders without considering any interference with their rights. Otherwise, many different theories could be produced, which may possess an equal strength to the consent theory but are based on a different disposition and composition of elements (e.g. social-will theory, moral-reliance theory, economic-consideration

theory, etc.). It is in this sense, that what the consent theory has added is something already implied methodologically by the other theories, and what it provides is a more complete theory only in the sense of quantity. However, quantity is not equal to quality. From a substantial point of view, Barnett does not bring about a "paradigm change" in the understanding of the nature of contractual obligation. The same problem is still around, that is, Could the nature of contractual obligation be explained in terms of one or two elements of making contracts?

1.4 The Problem with Promise Reinterpretation Approach

We have seen these three different versions of contractual obligation. In spite of their distinctive focus on social rules, or moral principles or consent theory, they have much in common with respect to methodology--- they try to reinterpret promise in a broad theoretical background,[52] and to articulate more fundamental principles to support the notion of promise. The main contribution of this sort of methodology is to break out of the legal positivist's circle --- the attempt to justify

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[52] In the consent theory, the same methodology is used. What barnett did is essentially to interpret the existing theories of promise in terms of the notion of consent.

legal rules within the legal dimension. Atiyah puts the justification of legal rules and moral rules in a broad social context, which is behind both law and morality. Fried promotes the classic notion of will to be a general moral and liberal principle, which dominates legal acts. Barnett applies his theory of social rules to the legal theory of entitlement, which is to him the root of contractual obligation.

If contractual obligation could be justified on a broader theoretical background, the essential issue in question will turn on the relationship between the fundamental theory and contractual rules. In this regard, Atiyah does not give many insightful ideas as how to build a relation between legal and moral rules on the one side and the social rules on the other. For Fried, in order to apply the promise principle to the different fields of contract law, he has to appeal to some residual principles. It is interesting to compare this with Atiyah's approach. Atiyah basically leaves the issue of the relation in question open, while Fried, to some extent, does explain the relationship between moral principle and legal rule. But the promise principle shows its tremendous limitations when it is clearly defined within the relation to contractual obligation. Although Fried fills up the gaps by appealing to the residual principles, he leaves the question of the relation between the promise principle and

the residual principles open again, and he also excludes many cases in order to make his promise principle legitimately work. The same problem exists in the consent theory. Because Barnett does not provide an unique and essential relation between the theory of entitlement and the notion of consent, the dependency of consent on entitlement may imply some different possibilities of explaining the nature of contractual obligation, although the consent theory possesses some ability to solve more problems than other theories.

These problems raise the same question, that is, Could the common formula --- promise is a sufficient condition for contractual obligation, provided it is based on certain fundamental principles --- offer a full understanding of the nature of contractual obligation? I think the different interpretations of promise have already implied an answer. Contract law is a very complicated institution, and the formation of contractual obligation is affected by various elements of making a contract. We will fail to understand the nature of contractual obligation fully if we cannot find out some fundamental elements, and if we cannot explain the essential relationship among them, and if we just stick on one element. The problems of the promise reinterpretation approach invoke the need for of a new theory which will be based on a new methodology.

CHAPTER II ECONOMIC GROUND APPROACH

Generally speaking, theories under this classification are those which analyze contract law from the perspective of economics. In terms of economics, two distinctive approaches are referred to respectively as the positive one and the normative one.[53]

The positive approach of economic analysis describes an implicit economic logic of contract law, and claims that contract law can be made intelligible by seeing it as concerned not so much with matters of justice or morality but with the efficient allocation of resources. The normative approach of economic analysis prescribes contractual rules or policies. Instead of describing contractual rules as compared with actual judicial behaviour, a normative model concentrates on what they should be, and it assumes that it is appropriate and desirable for courts, legislatures and other policy-making bodies to pursue some economic goals, such as efficiency and distribution of goods. The economic-ground approach

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[53] The discussion about positive and normative approaches, see Richard A. Ponser, Economic Analysis of Law 2nd. edition, 1977, part 1, chapter 2. also see, A. Mitchell Polinsky, An Introduction oto Law and Economics, Boston and Toronto: Little, Brown & Co. 1983. preface and chapter 1. also see, Jules Coleman, "The normative basis of economic analysis: a critical review of Richard Posner's The Economics of Justice", Stanford Law Review, Vol. 34, 1982, P.1105-1131.

referred to here is that of normative theories of the economic analysis of contract law, which try to justify contractual obligation as grounded in economic efficiency and distributive justice.

In this section, two theories of this approach will be discussed and assessed: a theory of economic efficiency and a theory of distributive justice. By presenting these two theories, I try to show that each of them provides a new perspective for understanding the law of contract. By evaluating these two theories, I am going to demonstrate that each of them is involved in some fundamental problems, which are rooted in this approach itself.

2.1 The Theory of Economic Efficiency

Efficiency theory is one of the most popular economic analyses of contract law. Economic analysis of contract replaces promising with efficiency as the basis of contractual obligation. Efficiency theory resembles superficially promise-based theory. Both of them focus on the voluntariness of the exchange in explicating contract. But exchange plays a very different role in the two theories. In promise theories of contract, for instance in Fried, voluntary exchange is the source of contractual obligation. According to Fried, whether the contractual exchange benefits parties or whether it facilitates the

realization of an efficient outcome is irrelevant to the decision to enforce a promise. Under the efficiency theory of contract, the notion of economic efficiency become a yardstick to justify the enforceability of a promise and the legitimacy of contract law. Acts of contracting, according to the economic approach, are "quintessentially economic activities".[54] In the process of economic activities, a market is the locus of opportunities for mutually advantageous exchange and the institution that allows the realization of efficiency.[55] Thus, the efficiency theory of contract is a market-based, not a promise-based theory. Under the market-based theory, economic efficiency serves as both an incentive and a goal for voluntary exchange. "Since efficiency is an important value in our society, a critique of contract law based on efficiency is a potentially powerful tool of legal reform."[56] The economic analysts of contract law use this tool as an important criterion to determine whether a promise should be enforced, to justify imposing costs on breaches of contract, and to evaluate contract rules and practice.

The notion of efficiency plays a very important role

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[54] Anthony T. Kronman & Richard A. Posner, The Economics of Contract Law, Little, Brown and company, Boston and Toronto, 1979, p. 1

[55]. R. Posner, Economic Analysis of Law, P.399-405

[56]. ibid. P.7

in economic analysis of contract law. Let us first explain what is meant by the so-called "efficiency criterion" in recent literature.[57] The first sense is Pareto efficiency. Under a Pareto efficient rule of law, all changes have been made that make at least one of the parties better off without making the other contracting party worse off. The second sense is "the relationship between the aggregate benefits of the situation and the aggregate costs of the situation."[58] According to Polinsky, efficiency will increase "the size of the pie" with less costs than benefits. The third sense equates efficiency with wealth maximization: the efficient rule of law maximizes the value of goods and services traded in the market. As Posner explains: "By a process of voluntary exchange, resources are shifted to those uses in which the value to consumers,

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57. Efficiency is a complicated notion in contemporary economics. Scholars use efficiency in different senses. J. Coleman summarizes: "Economists as well as proponents of the economic analysis of law employ at least four efficiency-related notions, including: (1) Productive efficiency. (2) Pareto optimality. (3) Pareto superiority. (4) Kaldor-Hicks efficiency. See Coleman, Efficiency, Utility and Wealth Maximization, Hoftra. Law Review,vol.8, 509, 512, (1980). I take meanings of (2), (3) and (4) above as different ranks of Pareto efficiency. (2) means, P is Pareto superior to Q, iff going from P to Q makes no individual worse off and at least one person better off. (3) means, P is Pareto optimal if no other states are Pareto superior to it. (4) means, P is Kaldor-Hicks efficient to Q, if after going from P to Q the winners could compensate the losers. (4) extends the Pareto ranking in the real world (including winners and losers). See C. Dyke, Philosophy of Economics (Prentiçe-Hall, 1981, P.95), also see coleman, supra note 1,1105-1107.

58. Polinsky, An Introduction to Law and Economics, P.7.

as measured by their willingness to pay, is highest. When resources are being used and where their value is highest, we may say that they are being employed efficiently."[59] These three meanings are more or less related. For my present purpose, I need only point out that when Posner frequently uses efficiency in the third sense, the notion of wealth maximization is essentially related to the former two senses.

The first question Posner asks is whether all promises should, prima facie, be enforced. In "Gratuitous Promises in Economic Law",[60] Posner examines carefully several cases in which a gratuitous promise could be possibly enforced in practice. But as a general rule of contract law, Posner maintains, "gratuitous promises are not enforceable."[61] The reason for that is quite simple, viewed from economic efficiency --- the costs of enforcing a gratuitous promise are much higher than the benefits of the promise. Presumably, there are some benefits a person could take from his gratuitous promise (e.g. a reputation for donating, a nice response from offering a dinner). But to enforce such a gratuitous promise will be highly costly, such as legal-error costs, the costs for courts in

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59. Posner, Economic Analysis of Law, P.10

60. See Kronman & Posner, The Economics of Contract Law, P.46-57.

61. ibid. P.50.

distinguishing a mere intention (subject to change at will) and a promise (an intention to be obligated), administrative costs (the costs of implementing a proposed rule and of accomplishing the function of the rule), etc. In short, it is inefficient to enforce a gratuitous promise. The point Posner makes here is that we have a sound explanation of why the courts don't enforce gratuitous promises, whereas the will theory, e.g., Fried or Barnett, cannot explain this so well.

The economic analysis of a gratuitous promise, according to Posner, is also suitable to the analysis of a bilateral promise.[62] That is to say, economic efficiency is also a distinct criterion to evaluate whether a promise should be enforced or not. A promise should not be enforced "where the enforcement cost--- to the extent not born by the promisor --- exceeds the gain from enforcement."[63], whereas a promise should be enforced where it increases the overall wealth of society. " The question whether it is economic for society to recognize a promise as legally enforceable thus requires a comparison of the utility of the promise to the promisor with the social costs of enforcing the promise."

This last point leads to a further issue of

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62. Posner says: "The economic case for enforcing the gratuitous promise, it should be noted, is similar to that for enforcing bilateral promises." ibid. P.48.

63. ibid. P.48

expectation damage. If a promise should be enforceable because of its efficiency, then the expectation deserves protection and damages for loss of expectation should be awarded. In other words, in order to justify the economic rationale of a wholly executory contract, Posner must go a further step to justify the award of expectation damages for breaches of contract, or, say, to justify imposing costs on breaches of contract. It is noted here that the rule of expectation protection is solely based on economic considerations, rather than any moral, social or consensual concern.

Viewed from the perspective of economic analysis, the conceptual paradigm of contract is a market contract --- a contract, entitled by mutual promises, to sell a certain amount of commodities at a specified date in the future market. "The contract then essentially is a bet against the future course of market."[64] For this reason, Posner agrees with Holmes' view that "It is not the policy of the law to compel adherence to contract but only to require each party to choose between performing in accordance with the contract and compensating the other party for any injury resulting from a failure to perform."[65] The

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64. Barton, "The Economic Basis of Damages for Breach of Contract", Journal of Legal Study, vol.1, P.278, 1972.

65. Posner, Economic Analysis of Law, P.88, also see, OLiver W. Holmes, The Path of the Law, in Collected Legal Papers P.167, 175, (1920)

criterion for making the choice between them, of course, is economic efficiency. If the completion of a contract would result in a waste of resources, then the law should not compel completion but remit the victim to a simple damage remedy.[66] If the breach of a contract would bring about an efficient outcome, then the law is encouraged not to violate the contract by imposing a penalty on the offending party.

According to Posner, expectation protection plays an important role in contract damages. Let us take Posner's hypothetical example to show that.[67]

A contracts to sell B for $100.000 a machine that is worth $110.000 to B, i.e. B's expected profit would be $10.000. Before delivery, C comes to A and offers him (1) $109.000 or (2) $111.000 for the machine promised B. In case (1), A will not be tempted to breach the contract, because he is liable to B for B's loss of expected profit. Given the measure of damages (B's expected profit of $10.000), C will not induce a breach of A's contract with B unless he offers A more than $110.000. If A's benefit is less than B's expected profit from completion of contract, there will be an incentive for A to execute a completion. In case (2), A will breach the contract and pay the expectation damages to B, because C's offer clearly

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66. Posner, ibid.P.89

67. See Posner,ibid.P.88-93

indicates the machine really is worth more to C than to B. If A's profit from breach would exceed B's expected profit from completion of the contract, and if the damages are limited to loss of expected profit, there will be an incentive for A to commit a breach.[68]

Therefore, in both cases, the expectation rule thus assures that the machine ends up where it is most valuable and in both cases the expectation damage rule produces the right degree of incentive on the promisor: he will perform, or breach and pay damages, according to whichever is the most efficient.

As mentioned before, efficiency as a criterion to evaluate the enforceability of promises is based on Posner's theory of competitive markets. According to Posner, the market and the legal system are similar in operation. Like the market, the legal system is viewed as a competitive process in which the pursuit of self-interest serves to promote an efficient allocation of resources. As in the market, contract rules are found to create economic incentives that encourage individuals to maximize efficiency. "Like the market, the legal system confronts the individual with the costs of his act but leaves the decision whether to incur those costs to him."[69] If this is the case, then the ultimate goal of contract law is then

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[68]. It is noted that I will give a critical analysis later.

[69]. Posner, ibid. P.399

seen to turn on the outcome that would mimic the market allocation and use of resources.

The theoretical foundation for Posner's market approach is derived from the Coase Theorem, which was formulated by Ronald Coase.[70] The Coase Theorem can be put in the following definition: "When transactions are costless and individuals act cooperatively, any assignment of legal rights will be efficient."[71] The most important contribution Posner made is to apply the Coase Theorem to different situations. For most cases in a real world, there are positive transaction costs. When the positive costs exist, Posner argues that the law should be structured to reduce transaction costs, for the Theorem assumes that transaction costs are zero. When transaction costs are impossible to reduce, Posner argues that the law should be designed to "approximate" the Coasian outcome by providing an "incentive for value-maximizing conduct." The borderline for Posner is that the law should be designed to approximate the value maximization that would be generated by market forces.

Applying this idea to contract law, Posner suggests that there are three economic functions of contract law.

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70. Ronald Coase, "The Problem of Social Cost", Journal of Law and Economics, vol.3, 1960.

71. J. Coleman, "Economics and the Law: A critical Review of the Foundations of the Economic Approach to Law", Ethics, July, 1984. p.651

First, contract law "will create incentives for value-maximizing conduct for the future"[72]. Second, the function of contract law is viewed as the effort "to reduce the complexity and hence costs of transactions by supplying a set of normal terms that, in absence of a law of contracts, that parties would use to negotiate expressively."[73] Contract law is to "furnish prospective transacting parties with information concerning the many contingencies that may defeat the exchange, and hence to assist them in planning the exchange sensibly."[74] In short, Posner regards contract law as means to promote economic efficiency in resource use and exchange by allocating legal responsibilities in a way that would serve to bring about the perfect market outcome.

Posner's efficiency theory, as we have seen above, basically borrows economic concepts and principles and tries to provide justifications for many aspects of classical contract law, such as the refusal to enforce a gratuitous promise, the enforcement of executory contracts and the protection of the expectation profit in awarding damages for breach. If we take contractual exchanges as a kind of economic activity, efficiency theory of course provides a new perspective which enriches our understanding

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[72] Posner, Economic Analysis of Law, P.68.

[73]. ibid.P.69.

[74]. ibid.P.69.

of contract law. Especially, the observations provided by economic theory about the effects of certain contract rules and principles on the efficient allocation of resources to some extent may rightly influence our normative assessment of contract law.

However, there are still several problems involved in the theory. The first one is to ask whether economic efficiency could be an independent criterion for distinguishing between enforceable and unenforceable promise. In the case of gratuitous promises, Posner simply refuses to enforce them because of their inefficiency. In the case of bilateral promises, if we enforce only those that increase the overall wealth of society, then we must assume certain information available, which can tell which agreement is efficient and which is not. Such kind of knowledge is certainly not available independently of the production of information by the real market. That is to say, we could get information of the sort only after the promise is executed or the contract is performed. Even if we could have information about that kind of case based on past experience, it is still a bet on the future market for an individual case. Hence, efficiency is ex post rather ex ante criterion. That is to say, efficiency theory fails to provide a distinction between enforceable and unenforceable agreements; rather, it simply starts to analyse contracts by assuming the enforceability of every promise.

The second problem is concerned with the postulation of efficiency. The efficiency theory takes as its basic assumption the view that free and voluntary exchanges must be to the advantage of the parties. If two parties make an agreement, it must advance the interests of each. This is of course a classical view of freedom of contract. One of the troubles for freedom of contract is that it takes background entitlement for granted for the contractual parties. In the classical theory of contract law, the intent or willing of contractual parties is the whole source of contractual entitlement and obligation. Efficiency theorists only replace the notion of will in classical theory with the notion of efficiency. In fact, contractual parties are better off only in relation to the legally permissible alternatives. A starving person benefits from contracting to buy at an exorbitant price only because the seller could legally withhold the food. Supposing a drug-addict may benefit from contracting to buy cocaine at reasonable price from a drug dealer, they will not be allowed to enter such a contract, because the drug is an inalienable entitlement. When a society prohibits the human body as the object of exchanges, that sort of contract would not be enforced, even if such a contract may meet the requirement of efficiency. Therefore, the benefits of an exchange must be measured against a background of alternative contracts and property entitlements. This

choice of background entitlement cannot be settled by a simple appeal to efficiency.

The third problem is related to the meaning of efficiency. It is entirely unclear whether efficiency refers to individual contractual interests or to the maximization of social wealth. Posner, as well as Polinsky, assumes that individual interests are consistent with social benefits especially in the absence of redistributive costs. In fact, in many cases, there is a conflict between individual and social interests. Atiyah, by discussing the machine example which Posner used, raises an interesting question: when C offers A $109000 for the machine, we should assume that C expects the same amount of profit as B does. If this is the case, then the machine is worth more to C than to B . Why should A deliver the machine to B but not to C according to the rule of expectation?[75] Atiyah did not answer the question.

I take the question to involve two different meanings of efficiency. When A delivers the machine to B, both A and B will be better off but social wealth will not be maximized comparing with trading it to C. When A delivers the machine to C, social wealth could be maximized but A is not better off compared with trading it to B.

It is clear here that the issue of the different meanings of efficiency becomes exactly the issue of which

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[75] P.S. Atiyah, Essay on Contract, supra note 6, p.151

form of distribution we prefer, or, say, the issue of which theory of justice we hold. Again, this is the first order of legal decision, and it can not be solved by reference to economic efficiency.

2.2 The Theory of Distributive Justice

It may be unfair to say that efficiency theory simply ignores the question of distributive justice. In fact, in accordance with the principle of free contract, efficiency theory supports the distribution of wealth achieved by an unbridled market . The strong version of the efficiency theory equates the notion of efficiency with the notion of distributive justice;[76] the weak version of the theory takes efficiency and distribution as having separate functions in setting the entitlement of contractual transactions.[77]

The theory of distributive justice challenges the claims about the justice of the free market. It insists that the legitimacy of market relations depends on the fairness of the terms and their distributive consequences. Since a market may lead to an unfair distribution of

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76. See, Posner and Polinsky, supra note 1.

77. See, G.Calabresi and A. Douglas Melamed, "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral", Harverd Law Review,vol. 85, 1972, p.1089-1128

wealth, it must be refined and controlled in order to make contractual relations legitimate. The main idea of the theory is that distributive justice should be a morally legitimate goal for contract law. To quote Kronman's words, "The law of contracts should also be used as an instrument of distributive justice and those responsible for choosing or designing rules of contract law --- courts and legislatures ---should do so with an eye to their distributive effects in a self-conscious effort to achieve a fair division of wealth among the members of society."[78]

It is noted that the motivation for Kronman's proposing a theory of distribution initially is to criticize libertarian and liberal theories of justice rather than efficiency theory. The libertarian refuses to justify contract law as promoting the goal of distributiv justice and takes the compulsory transfer of wealth as illegitimate. The liberal also maintains the non-distributive concept of contract law, but concedes the legitimacy of distribution of wealth in terms of taxation. According to Kronman, both theories of justice are untenable. On the one hand, by criticizing the 'stronger' libertarianism, Kronman argues that consideration of distributive justice must be taken into account in designing rules for exchanges, "if the law of contracts is

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78. Anthony T. Kronman," Contract Law and Distributive Justice", The Yale Law Journal, vol.89, 1980, p.472.

to have minimum moral acceptability".[79] On the other hand, by challenging the 'weaker' liberalism, Kronman argues for the implementational function of contract law as distributive justice. In the following, I shall first present Kronman's argument against the non-distributive conception of contract law in libertarianism and liberalism and his arguments in support of a distributive goal in contract law. Then, in assessing his arguments, I will suggest that Kronman does raise an important issue of distributive justice in contract law, but he fails to do justice to the issue, because the rationale behind his argumentation does not essentially go beyond libertarianism or liberalism.

According to Kronman, the libertarian theory of contract is based on the premise that a contract must be enforced if it is a voluntary agreement, regardless of its consequences of the welfare of the individuals involved. As a warning in advance, Kronman interprets the requirement of voluntariness not as a formal requirement, by which a libertarian may purport to rely upon a purely procedural concept of justice. This is shown especially by the case of Barnett. For the libertarian Barnett, consent (which implies the notion of voluntariness) is not a procedural requirement for an enforceable contract, but rather it is a substantive requirement of justice.

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79. ibid. P.474.

On the formal account of voluntariness, the question of justice in exchanges is to be reduced to that of legal procedures in the exchange and is to be regarded as a method of adjudication, which focuses on the legal processes leading up to an agreement but not its distributive effects. Kronman maintains that the libertarian is ultimately not a proceduralist at all, because he must require that those procedures have been fulfilled voluntarily. By the requirement of voluntariness, Kronman argues, the liberiarian shows concern about the voluntariness of agreements itself. It is true again, in the case of the consent theory, that what Barnett is really concerned about is consent to an agreement itself, not in issues of pure procedure. That is the reason why Barnett provides a theory of entitlement for the notion of consent. According to Kronman, the essence of voluntariness is consistent with a moral theory of libertarianism, which is meant to "vindicate the idea of individual freedom".[80] Therefore, the requirement of voluntariness actually commits the libertarian to a substantive or non-procedural conception of justice.

The question is that, Kronman continues, it is difficult for a libertarian to distinguish between legitimate and illegitimate advantage-taking in contractual relations by reference to the notion of voluntariness. In

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80. ibid. P.477

many circumstances, agreements initially seem voluntary (absence of physical coercion or even fraud) but consequently are shown to be involuntary (i.e. in the case of non-disclosure). In other words, the latter cases are less directly concerned with the question of voluntariness. In order to avoid the infinite regress (a very broad conception of voluntariness), libertarians have to specify how the circumstances "under which an agreement is given deprive it of its voluntariness."[81] Since voluntariness alone will not handle this problem, the libertarian must require an independent principle, which can distinguish between legitimate and illegitimate advantage-taking in contractual exchanges. Moreover, whatever the principle is, it must be compatible with the libertarian conception of individual freedom.[82]

The liberty principle is thought to be the first choice as an independent principle, according to which advantage-taking is legitimate unless it infringes the right and liberty of the other party. Although the

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[81] ibid. p.482-483

[82] It is noted that here Kronman sets two criteria for choosing an independent principle for libertarianism: one is to distinguish between legitimate and illegitimate advantage-taking; the other is to fit the basic moral requirement of libertarianism. Ibid. p.483. As we will see in the following discussion, Kronman's second criterion in fact is not libertarianism in the strict sense, because it requires both individualism and egalitarianism as two aspects of libertarianism. In other words, I take it the second criterion is essentially liberalism.

criterion of 'infringement' may discriminate between legitimate and illegitimate forms of advantage-taking, Kronman maintains that the liberty principle certainly begs a question: in order to know which rights are infringed, we must first know who has what rights, and therefore we should already have a theory of right or liberty. The second alternative is the principle of utilitarianism. Kronman dismisses utilitarianism, on the ground that it violates libertarianism's individualism.[83] The third alternative is the principle of natural superiority. Kronman rejects it, on the basis that it violates the libertarianism's egalitarianism.[84]

This leaves, Kronman claims, only the paretian principle, which not only allows particular forms of legitimate advantage taking if it puts the disadvantaged party in a better position than he would otherwise have been in, but which is also compatible with the basic ethical commitments of 'libertarianism.'[85] On the one hand,

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[83] ibid. p.486

[84] ibid. p.484

[85] ibid. p.486-487. It is noted that Kronman takes the principles of paretianism as being consistent with the basic commitment of libertarianism. In fact, the term 'libertarianism' here shall be read as liberalism, because the principles of Kronman's "paretianism" are really 'Rawlsian' principles. The sense underlying this paretianism is a basic tenet of liberal thought, as for example it is articulated in John Rawls' a difference principle". Rawls' point is that inequalities must be justified in light of, and consistent with, an abstract notion of equality. Given that inequalities inevitably

the paretian principle is individualistic, since it does not determine the legitimate form of advantage-taking with respect solely to the interests of someone else. On the other hand, the paretian principle is egalitarian, since it permits only forms of advantage-taking which benefit all concerned.

So far Kronman shows that the requirement of voluntariness, a central idea of the libertarian theory of justice, cannot be understood unless in terms of a principle of paretianism. Since the principle of paretianism explicitly implies the question of "how rights to transactional advantages in the exchange process itself

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occur, it nonetheless remains that their occurrence ought to be given a reasonable and rational form. Thus, while "all things" are not equal in reality, the form of inequality must itself reflect equality. See John Rawls, A THEORY OF JUSTICE, (Cambridge: Harvard University Press), p.75-83. If I understand Kronman right at this point, then Kronman confuses two different meanings of paretianism. He is being misleading when he says that the principle of paretianism has its close connection with the idea of Pareto efficiency (at p.485), because the traditional meaning of Pareto efficiency is substantively different from the notion with which Kronman is operating and which he calls 'paretianism'. The former is a fairly weak notion which requires that the person taken advantage of was not made worse off, whereas the latter sets the higher standard that the person taken advantage of must be made better off by the advantage-taking (see supra note 57). Accordingly, Kronman is being also mislesding when he says that paretianism is consistant with the basic ethical commitments of libertarianism (at p.485), because the notion of paretianism used by Kronman implies a strong sense of equality, which would not be accepted by any libertarian. Note that I am using 'paretianism' in Kronman's idiosyncratic sense from here to the end of this section.

are to be distributed."[86] Kronman argues that a judgement of distributive justice is needed to explicate the notion of voluntary justice.

According to Kronman again, assuming both the libertarian and liberal concede that there is a theory of distributive justice in the exchange process itself (that is to say, supposing that they both accept the paretian principle), the libertarian still holds that differences of wealth resulting from voluntary exchanges do not need further justification, and the liberal also claims that the existing disparities in wealth should be rectified by taxation rather than by manipulating the contractual rules for private exchange.

In rejecting the stronger libertarian position, Kronman argues that if a libertarian uses a principle of distributive justice to judge the voluntariness of exchanges, consistency forces him to use a principle of redistributive justice to develop contract rules that redistribute wealth.[87] To elaborate, there are two sets of contract rules: one is to determine whether a contract is invalid because of illegitimate advantage-taking (e.g.,coercion and deceit); the other is to govern the content or the end-state of contracts (e.g.,minimum wages). Since both of them are designed to limit "advantage-

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[86]. ibid. P.495

[87] ibid. p.495

taking", Kronman argues, it is arbitrarily for a libertarian to limit "advantage-taking" in one context (e.g., the starting-point or the processing of transactions) and not the other (e.g., the content or the end-state of transactions). In criticizing the weaker liberal position, Kronman points out that it is entirely an empirical issue whether a taxation or a regulation scheme is more intrusive into individual liberty. In practice, taxation is not necessarily less intrusive or less costly than a regulation scheme.

In assessing Kronman's theory of distributive justice, let me first summarize his arguments as follows. (1) Since a libertarian endorses voluntary exchanges and prohibits involuntariness, then the libertarian must employ a substantive notion of voluntariness (a thick notion) rather than a procedural notion of voluntariness (thin notion). (2) Since a libertarian has to choose the paretian principle to restrain the use of talent and wealth in exchanges, the libertarian must favour using contract rules to redistribute wealth from rich to poor.

There are three key claims linked together in Kronman's arguments: first, a libertarian must be committed to a substantive notion of voluntariness; second, paretian principles must be the only ones which would be adopted by a libertarian; third, contract law as an instrument can be justified by paretian principles. If Kronman's arguments

are to be plausible, these three premises must be sound and their connections should be justified. Let me examine them in detail.

(1) Is a libertarian committed to a substantive notion of voluntariness? The answer is "yes" and "no". That is, different libertarians would give distinct responses. Hobbes, for example, clearly deploys a "thin" notion of voluntariness.[88] It is no difficult for Hobbes to distinguish between legitimate and illegitimate advantage-taking in contracts, even when he regards coerced agreements as giving rise to binding obligations. He claims, "if I be forced to redeem myself from a thief by promising him money, I am bound to pay it, till the civil law discharged me."[89] That is to say, voluntariness is an essentially procedural requirement of law. On contrary, as I have mentioned elsewhere, Barnett is committed to a "thick" notion of voluntariness. Instead of discussing voluntariness, Barnett introduces a broader notion of consent, which contains subjective intention and objective manifestation, and includes consideration of the bargaining process and justification of the entitlement of

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[88] Hobbes says:"It is manifest, that not only actions that have their beginning from covetousness, ambition, lust, or other appetites to the thing propounded; but also those that have their beginning from aversion, or fear of the consequences that follow the omission, are voluntary actions." Leviathan, (Collings Sons & Co. Ltd; Glasgow, 1962), p.88

[89] ibid. p.153

exchanges. For Barnett, by reference to a theory of rights, contractual obligation could be understood in terms of consent. Therefore, Kronman' first claim at least need to be modified by reference to some particular libertarians and in specified contexts. Even so,

(2) Must a libertarian only adopt the principles of paretianism? Kronman says: "if a libertarian were required to choose among the three, the only one that he could choose without abandoning his most fundamental moral beliefs would be the third."[90] There are numbers of questions involved here. First, as one commentator points out, Kronman does not demonstrate why the libertarian would not choose one or more principles to limit "advantage-taking". He suggests that an alternative approach would be a plurality of moral principles that might have different relevance in different circumstances.[91] Second, as I have mentioned before, if a libertarian really would adopt the principles of paretianism (as understood by Kronman), he would be no longer a libertarian, because paretian principles essentially belong to Rawlsian liberalism. Although there might be many common views shared by both libertarianism and liberalism, they definitely have different views on the issue of distribution of wealth: a

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[90] ibid. p.485

[91] Baker, "Starting Point in Economic Analysis of Law", Hofstra Law Review, vol.8, p. 939, 970.

libertarian would not care about the end-state of an transaction, whereas a liberal might favour taxation (or whatever means) to redistribute wealth of society. Third, the libertarian antipathy toward "involuntariness" in exchanges is based on the belief that individuals have the right to private property, and should not be deprived of it without their "consent"; whereas the rationale behind Kronman's paretianism requires that all assets be considered part of a "common pool or fund in which no one--- not even the person who possesses the advantage --- has any prior claim."[92] Therefore, I doubt very much whether a libertarian such as Barnett (certainly neither Hobbes nor Nozick) could accept Kronman's paretianism. In order to continue to assess Kronman's final position, let me just suppose a "libertarian" adopts paretian principles. But even so,

(3) Is the theory of distributive justice justified by the principles of paretianism? Kronman's paretianism is closely related to classic Pareto optimality, in which all exchanges that have been made make at least one person better off and no one worse off.[93] Since classical Pareto optimality is of no direct assistance in evaluating "advantage-taking", Kronman denies that it is merely an

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[92] ibid. p.493

[93] See supra note, and also Posner, The Economics of Justice, supra note, p.54-55

economic test, and reinterprets it as permitting "advantage-taking" if it works to the long-run benefit of those disadvantaged by it.[94] There are at least two problems involved here. On the one hand, because Kronman defines "advantage-taking" in a very broad sense,[95] he cannot assume that if a libertarian shows concern about the victims of some advantage-taking, the libertarian will then protect victims of all kinds of advantage-taking. On the other hand, if a theory of distributive justice could be justified in terms of paretianism, the underlying rationale of paretianism, as I point in (2), is liberalism, not libertarianism. A liberal theory of distributive justice might have something to do with the redistributive end-state wealth, but Kronman is still unable to make the claim that contract law should be an instrument for regulating the redistribution of social wealth.

Kronman seems not clearly aware of his liberal position. In his last few paragraphs, Kronman even tries to criticize the 'weak' version of liberalism. The reasons Kronman gives against the liberal theory of distributive justice are implausible too. Kronman offers a few empirical cases which demonstrate that taxation is not necessarily

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[94] ibid. p.491 n.47 and acccmpanying text.

[95] Kronman says, "in this broad sense, there is advantage-taking in every contractual exchange. Indeed, in mutually advantageous exchanges, there is advantage-taking by both parties." ibid. p.480

less intrusive and costly than a regulation scheme. Presumably, liberals could offer many cases to show a regulation scheme is more intrusive than taxation, as Polinsky does in his book.[96] Kronman intends to connect efficiency (the issue of cost) with the issue of justice, and this intention is certainly wrong. As we mentioned before, efficiency is a formal theory, while justice is a substantive claim, and to use efficiency to evaluate justice is a theory of "head over heels".

2.3 The Problem With Economic Ground Approach

At a first blush, the theory of economic efficiency and the theory of distributive justice seem quite different versions of contract theory. While the former takes contract law as maximizing economic value, the latter regards contract law as promoting distributive justice; the former sees economic efficiency as the sole criterion to test the enforceability of a contract, whereas the latter views the distributive end-state as the yardstick to identify a legitimate advantage-taking in a contractual transaction. Why should we put them together as the same approach?

There is something common to both of them. First, both

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96. Polinsky, supra note 1. Sections on efficiency and equality.

the notion of efficiency and the notion of distribution belong to economic terminology, and efficiency and fairness are two of the most important topics in contemporary economics. It is in this sense that Posner and Kronman say, the actions governed by contract law "are quintessentially economic activities".

Second, instead of focusing on the issue of the source of contractual obligation, both of them propose some standards to explain and evaluate the law of contract, and furthermore, they present those standards as a recommendation to courts and legislatures to take the decisions or enact that statue which is value-maximizing or justice-promoting. That is, both look forward to some goal, rather than backward to some event.

The common features of the economic ground approach produce two problems. On the one hand, for courts, lawyers and contractors, how do they identify the appropriate standard by which enforceable commitments could be distinguished from those unenforceable ones? Theoretically, they have to be specialists in economics. Practically, they must first assume all the commitments are legally enforceable, because information concerning efficiency and fairness is not available until a contract is completed. In short, economic ground approach lacks power to predict the enforceability of a contract.

On the other hand, what is the reason for us to

choose one standard rather than another? Even we assume that there are only two standards (efficiency and justice), it is still hard for us to make a choice or strike a balance between these two. Polinsky maintains that efficiency should be the first choice when there are no transaction costs; fairness has to be considered when transaction costs exist. Even so, his selection for making choices is still value maximizing (the size of the pile). G. Calabresi and D. Melamed develop a framework with "property rules" and "liability rules" in order to make a balance between efficiency and justice. But as Kronman points out, their framework might be all right to apply to other areas of law, such as nuisance law or criminal law, but "In their discussion of property and liability rules, Calabresi and Melamed do not consider one very important species of legal right: the kind of right that is created by contractual agreement, the right to the performance of a promise."[97]

The very issue here is, By what criterion do the theorists of this approach establish their standards to evaluate the law of contract? Posner tells us that it is legitimate to impose expectation damages on the breach of a contract, because the primary purpose of contract law is value-maximizing. Kronman claims that it is justified to

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[97] A.Kronman, "Special Performance", in The Economics of Contract Law, see supra note, p.182

use contract law as an instrument to regulate the end-state distribution, because the primary function of contract law is justice-promoting. However, both of them do not tell us why should contract law be found on efficiency or justice? In sum, the economic ground approach lacks the ability to explain or justify its own theoretical foundation.

CHAPTER III CRITICAL LEGAL APPROACH

Theories under this classification are those that apply the more general ideas and methods of Critical Legal Studies to the law of contract. In the face of the fact that law has changed dramatically during the course of the present century, the critical legal approach claims to have "undermined the central ideas of modern legal thought and put another conception of law in their place."[98] It attacks the orthodoxy of legal thought which has continued to depend upon that developed by Hobbes and Locke, and criticizes the modern legal consciousness which is held by judges, lawyers and legislatures. The critical legal approach maintains that law cannot be understood in terms of its rules and doctrines, and claims that "there can no plausible legal theory without a social theory".[99] Thus, the critical legal approach is not jurisprudence in its strict sense, but is to be viewed as a "package theory", which contains many theoretical pieces, including social theory, politics, economics, historical thought and

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98. R. Unger, The Critical Legal Study Movement, 96 Harvard Law Review, p.561, 563. (1983)

99. J.H. Schlegel, "Introduction",28, Baffalo Law review, p.203,(1979)

philosophy.[100]

Two important theories under this approach will be discussed and evaluated: Kennedy's external critique and Collins' immanent critique. Both theories criticize the underlying value and ideology of existing contract law, and try to provide a new social ideal for reconstructing it. The difference between them is the following: Kennedy's critique is radically ideological, while Collins' critique attempts to find in contract law itself values other than the principles of enforcing the will of parties, so as to reconstruct the law of contract around a group of values already implicit in it.

3.1. The Controversy of Legal Form and Substance --- Kennedy's External Critique Theory

In a recent interview, Duncan Kennedy denies that there is any particular ideology or manifesto, or even certain basic doctrines for the Critical Legal Studies movement.[101] However, it is known to all that there are already distinct methods which have been characterized as "Critical Legal Studies", although it is really still a

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100. See M. Krygier, Critical Legal Studies and Social Theory, A Response to Alan Hunt. 7, Oxford Journal of Legal Study, No.1, p.26-39,(1987)

101. Are Lawyers Necessary? Barrister interview with D. Kennedy. Barrister 14. Fall 1987.

question of whether CLS itself has a coherent theoretical understanding of law or its place and functions in society. In spite of the many different versions of CLS, they share in common some basic motivations or methods: to attack legal formalism; to expose the contradictions of modern law; and to argue for a societal transformation.

These methods of CLS have been applied to diverse substantive areas of law, such as labour law, constitutional law, criminal law and legal education. It has been maintained that contract law presents unique opportunities to apply critical analysis.[102] According to critical theorists, contract law is typical of the more general respects in which law is filled with controversy. The structure of modern contract law represents a simultaneous retention and rejection of formalist adjudication and liberal ideas of free contract. On the one hand, modern principles have departed from pure formalism and permit the judge to consider the social context of private agreements. On the other hand, a rule structure continues to govern contract interpretation and enforcement.[103] As a consequence, modern contract doctrine, on the one hand, allows courts to refuse enforcement of unconscionable agreements, and on the other,

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102. See supra note 1, p.616-648.

103. The modern approach to contract law is stated in Restatement (Second) of Contracts (1981)

requires courts to enforce strictly freely made agreements. According to Feinman, the incoherent mixture of purposive and formal guidelines for contract adjudication represents a lack of general agreement over the social purposes to be effectuated through contract law.[104]

D. Kennedy, in a famous essay,[105] uses the methods of CLS to discuss the tension in modern contract law. He reveals the conflicts in legal form and substance, and asserts that the contradiction of modern contract law is ultimately rooted in a larger conflict between opposing social visions.

Kennedy's argument consists of four steps: formal, substantive, correspondent and foundational. His discussion describes a process from the erosion of rigid rules of theory of contractual obligation to the socialization of contract theory.

Kennedy starts with the conflict of legal form--- rules versus standards, then he discuss the contradiction of legal substance---individualism versus altruism. By means of a common intuition that altruism is related to standards while individualism is allied with rules, he argues that the formal conflict reflects the substantive contradiction. Finally, a discussion of morality, economics and politics

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104. See Feinman, Critical Approach to Contact Law,30, University of California at Los Angeles Law review 829,(1983)

105. D. Kennedy, Form and Substance in Private Law Adjudication, 89 Harvard Law Review, p.1685-1778.

reveals that the dichotomy of individualism-rules versus altruism-standards is rooted in opposing visions of humanity and society. The conclusion drawn by Kennedy is that various interpretations of contract law are based on a radical conflict of social ideologies. In the following, I shall first present Kennedy's argument and then, by assessing his critique, I suggest that it is implausible for him to draw the conclusion that private law, especially contract law, is radically contradictory.

Kennedy begins his discussion by capsulizing the arguments advanced by those favoring a legal regime of rules, and then contrasts them to familiar countervailing arguments advanced by those favoring a greater reliance upon standards. In the following three aspects of the formal dimension, rules and standards show their different functions.

The qualitative difference between rules and standards consists in formal realizability, which means "to describe the degree to which a legal directive has the quality of 'ruleness'".[106] The legal rules are designed to deal with some factual aspects of a particular situation by intervening in a determinate way. Rules promote certainty and constraint of official arbitrariness, but they have a cost of mechanical arbitrariness, namely the "sacrifice of

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[106] ibid. p.1687

precision in the achievement of the objectives lying behind the rules".[107] In contrast, standards refer to the substantive objectives of the legal order. Although they sometimes have the features of uncertainty and arbitrariness, standards are capable of greater fidelity to social values and objectives underlying the law.

The quantitative difference between rules and standards lies in the second aspect of the formal dimension --- generality vs. particularity. Although rules will produce a stable situation in that people have them to follow and judges have to apply them, a general rule will be more over- and under-inclusive than a particular rule, while the multiplicity of "particular rules undermines their formal realizability by increasing the jurisdictional questions".[108] Alternatively, standards could fill up a gap which is within or beyond rules, although they do not create a paradigm of legal form.

The practical difference between rules and standards is in the third dimension --- formality vs. deterrence of wrongdoing. Within the context of formality, the under-inclusiveness of rules invites refusals to enforce contracts intended to be binding, whereas the over-inclusiveness of rules tries to enforce contracts contrary to the intent of the contractual parties. The uncertainty

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[107], ibid. p.1689

[108]. ibid. p.1690

of standards discourages people from making contracts, while the arbitrariness of standards encourages the freedom to make contracts without legal bindingness. Within the context of deterring wrongdoing, the mechanical arbitrariness of rules easily results in punishment of innocent behaviors and the reward of guilty behaviors, whereas the biased arbitrariness of a standard will "'chill' behaviors on the borderline of substantive obnoxiousness".[109]

According to Kennedy, contextualization is an attempt to fill up the gap between pro-rules and pro-standards perspectives. One way to contextualize both rules and standards is called the social engineering standpoint, which seeks to develop a practical principle to guide legislators and judges in deciding when to use rules and when to use standards. Unfortunately, in and of themselves infinite particular situations produce no way to generalize about what form best suits the peculiar nature of the subject matter. Another way to contextualize is called the social science approach, which tries to work out the relationship between the choice of legal form and the interests of the participants. But that very relationship is what is in fact involved in substantive debates, that is, what social values and what visions of the universe the participants (legislators, judges, lawyers and contractors)

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109. ibid. p.1696.

should take. Hence, pro-rules and pro-standards are invitations to choose sets of social values and visions of the universe. In other words, the conflict between rules and standards is rooted in the substantive dichotomy of individualism and altruism.

According to Kennedy, individualism and altruism are "two opposed attitudes that manifest themselves in debates about the content of private law rules."[110] The essence of individualism is characterized by self-interest, and the form of conduct associated with individualism is self-reliance; that is, I am fully responsible for myself. However, individualism is to be noted as being different from egoism, which is excessive selfishness. In the legal course, an invisible hand will transform excessive selfishness into public interests and a 'clenched tooth' will show that the immorality of law is the necessary price for making law moral. In addition, individuals have inalienable rights whose content can be derived from fundamental concepts like freedom or humanity. Contrary to individualism, "the essence of altruism is the belief that one ought not to indulge a sharp preference for one's own interests over those of others."[111] The simplest norm of altruist behaviour is sharing and sacrifice. But altruism is importantly different from saintliness, which is total

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110. ibid. p.1713.

111. ibid. p.1717.

selflessness. In the legal context, "altruism must justify stopping short of saintliness."[112] The altruist's duties are the products of the interaction of three aspects: a communal intimacy between parties, a conflict between moral fault and virtue, and an intensity of deprivation averted and benefit secured.

In spite of the distinctive visions of individualism and altruism, Kennedy claims that they possess equivalent cultural force, and that understanding of the normative basis for private agreements requires a reflection on the role of both in legal history. On that score, Kennedy identifies three broad phases of development.

During the Antebellum Period (1800-1870), the Judeo-Christian ideal of altruism was viewed as the only legitimate value of morality. However, the needs for economic development required that the law accepted a certain degree of moral imperfection. As a result, the court's effective role was regarded as one of enforcing realistic standards of morality conducive to economic initiative, whereas legal enforcement of altruist standards was dismissed as futile.[113]

In the period of Classical Individualism(1850-1940), self-interest became the mainstream of values and morality. Kennedy claims that legal formalism has its origins in this

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112. ibid. p.1718.

113. ibid. p.1725-1728.

period. The individualist freedom and will constituted the whole foundation of private law at that time, and subsequently evoked into being the deductive premise of formalist law. On that basis, doctrines such as fraud, duress, and incapacity were recast to conform with the ideal of individualism.[114]

Kennedy's periodization of the modern thought (1900-present) could be read as either a period of increased tension between individualism and altruism or as one of philosophical disarray. On the one hand, the formalist notion of rules and the individualist principle of free contract contradicts current legal practice; on the other, the conception of standards and the principle of altruism lack a coherent vision upon which to base their proposals. Instead of the debate between rules and standards in previous periods, modern legal debates are characterized by competing principles, such as community vs. autonomy, regulation vs. facilitation and paternalism vs. self-determination.[115]

These two competing claims, according to Kennedy, raise a methodological problem. On the one hand, given the sameness of the sources from which each draws a distinctive or even contradictory conclusion, these two opposing modes serves as responses to the same legal

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114. ibid. p.1731-1737.

115. ibid. 1931-1937.

reality. On the other, within the traditional boundaries of the legal domain there is no metaprinciple upon which evaluate them. "As a result, it is impossible to prove or disprove the validity of the two contracts."[116] In order to solve the problem, we have to transcend the legal dimension, and "break down the sense that legal argument is autonomous from moral, economic and political discourse in general."[117] In other words, the dispute between rule-individualism and standard-altruism will have to be examined within an account of comprehensive social context.

At the level of moral discourse, there are two analogues: the strong one between arguments advocating rules and defending individualism; the rhetorical one between arguments relaxing the rigour of rules and supporting altruism.

At the level of economic issues, two opposed arguments for rules and for individualism centre around their rejecting result-orientation in the particular case in favour of an indirect strategy. Rules as noninterventionist, on the one hand, are essentially individualist; but on the other, presuppose state intervention. Therefore, "the economic individualism of rules is interstitial and relative rather than

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116. ibid. p. 1732.

117. ibid. p.1724.

absolute".[118] The dispute between rules for classical laissez-faire versus altruism shows that the radically opposing views of rule-individualism versus standard-altruism could each give their own coherent explanation of contract law, according to their different economic pictures of society.

At the level of political issues, the debate between rule-individualism and standard-altruism turns to the political confrontation between rights and powers. The advocate of rules argues that the "casting of law as standards is inconsistent with fundamental rights of a citizen of a democratic state".[119] The argument of "institutional competence" seems to be pro-standard-altruism, whereas the argument of "political question gambits" is prototypically individualist. Since there is no dominant ideology in society, lawmakers and law-appliers must make their own choices, but no absolute justification for those choices is available.

The moral, economic and political arguments have already implied that the conflict between rule-individualism and standard-altruism is rooted in their contradictory fundamental premises --- two sets of radically opposing visions of humanity and society. In other words, the conflict between legal form and substance

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118. ibid. p.1742.

119. ibid p.1752.

is only the reflection of contradictory regimes of social vision.

The individualist regime for society is a kind of libertarianism, which maintains that individuals have total freedom to pursue their interests without needing to care about those of others. The highest notion of value for individualism is subjectivity and arbitrariness. Society and others are only means for gaining personal benefits. Therefore, judges are simply rule appliers, and legal rules should be in favour of nonintervention.

The altruistic regime for society is a kind of collectivism, which claims "we attain the goal only when we surmount our alienation".[120] Contrary to the values of arbitrariness and subjectivity, altruism proposes the values of certainty and objectivity as a universal ideal of human brotherhood. The judges and contractual parties do not have their own interests in the real sense, and they are bound together for the same end. The judges' decisions ought to be based on a person-in-society perspective rather than an individual interest one, and persons are held to be responsible for looking over their shoulder at the results of their actions on others..

The contradiction between these two regimes of social ideology is the follows: it is impossible for individualism to generate such rules that could define a just society;

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120. ibid. p.1771

there is no way for altruism to overcome the dichotomy of subject and object as long as others are independent and unknowable beings. According to Kennedy, it is not merely a question of acknowledging this contradiction, but more importantly, one of our being aware that it is in its very essence unsolvable. "There is no metasystem that would, if only we could find it, key us into one mode or the other as circumstances 'required', ... we cannot 'balance' individualist and altruist values or rules against equitable standards, except in the tautological sense we can, as a matter of fact, decide if we have to."[121] Because no higher-level concepts can provide a standard of measurement, social life and ideology remain as the final category that must be attended in making a balance.

Kennedy's essay clearly illustrates the general attitude of critical legal theory toward modern contract law. He reconceptualizes the debate over choice of legal form in terms of a broader moral conflict, and he recasts legal substance in terms of a struggle between competing counter-ideologies. If sound, his dissolving the separation between law and values associated with formalism counts as a heavy hit on legal positivism. Because the connection drawn by him between legal form and underlying social philosophy suggests an affinity with the idea of law as social praxis, Kennedy in effect expands normative

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121. ibid. p.1775.

jurisprudence to encompass a much broader realm of concerns. These insightful thoughts move our understanding of contract law to a new and different plane of analysis.

However, these possible implications of Kennedy's position on the transformation of contract law are not the issue at hand. As to his arguments themselves, are they plausible ones for saying that private law, especially, contract law, is radically contradictory? Furthermore, does Kennedy provide us a positive foundation for contract law?

To answer the first question, we need two requirements. One is that all his arguments about formal conflict, substantive dichotomy, correspondent necessity and fundamental contradiction are clearly sound. The other is that the connection between one conflict and another is essential.

In his discussion of legal form, Kennedy identifies two opposed modes of legal directives, rules and standards, and he asserts that they are not only different but also conflicting. No one would doubt that rules and standards have distinct features and different functions in contract law. The question is, From the distinctiveness and difference between them, is it valid to draw the conclusion of absolute conflict between them?

In order to answer the question, let us introduce two different kinds of legal cases: easy cases and hard

cases.[122] So-called "easy cases" mean that a legal rule or a legal standard could unambiguously be applied to a set of material facts without other relevant controlling rules or standards. In such a case, the judge is then uncontroversially required to give the decision the rule (or the standard) indicates,"[123] and so, there is no conflict between rules or standards. So-called "hard cases" mean that more than one rule or one standard could be applied to a set of material facts, and thus a judge's view may result in different results or conflicting results.[124] In such cases, there is the possibility for conflict between rules and standards. It is noted that the possibility originates from the adjudicatory obligations of judges, or according to Kennedy's view, it comes from the debates of legal substance.

Two conclusions could be drawn from the analysis of "easy" and "hard" cases. First, rules and standards do not necessarily conflict with each other in all cases. Only in some "hard" cases, is there a possible conflict between

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122. The distinction between 'easy cases' and 'hard cases' I quote from Roger A. Shiner's essay titled "Adjudication, Coherence and Moral Value", in Legal Theory meets Legal Practice, ed. by Anne Bayefsky, Academic Printing & Publishing, Edmonton, Canada. p.87-108, 1988. It originally comes from R. Dworkin, Taking Rights Seriously, (Combridge, MA: Harvard University Press, 1978); see ch.4

123. ibid. p.88.

124. There are three possible cases: a rule conflicts with another rule; a rule conflicts with a standard; a standard conflicts with another standard.

them. Second, if there is a conflict, the cause of conflict is not the legal form itself but one beyond legal form. Therefore, Kennedy's argument for conflicting legal form is not plausible without further explanation. However, Kennedy is right when he passed from the conflict of legal form to the contradiction of legal substance. Accordingly, let us continue to examine the issue of legal substance.

In the legal substance discussion, Kennedy develops two different versions of individualism and altruism, a legal conception in his section III and a social conception in his section VIII. But there is a gap between his legal analysis and his social one. When they are regarded as legal conceptions, individualism is strictly distinguished from egoism, and altruism is essentially different from total selflessness or saintliness. Seemingly, individualism cannot work unless it takes some elements from altruism, and vice versa. That is to say, in legal discourse the conflict between individualism and altruism may not be so rigid that they could contradict one another in all cases. And yet, when they are analyzed in terms of social ideology, Kennedy pushes them into two opposed poles. Individualism holds to absolute subjectivism and arbitrariness of values. Altruism denies subjectivism and arbitrariness and holds "a universal ideal of human brotherhood."[125] The gap appears here. If Kennedy's

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125. D. Kennedy, supra note 1. p.1772

argumentation goes from legal form, legal substance to social visions, then legal analysis must be the foundation of social analysis. If the conflict is not so rigid in the legal analysis, then what is the foundation for Kennedy to say that contract law is radically contradictory?

Although Kennedy's tone in the essay is very critical, it is still harsh to say that his argument is completely negative or destructive. His passion for a destructive character is directed toward denying legal formalism and legal positivism. But Kennedy sees his argument as constructive in the sense of freeing judges to pursue social policy. Although he dismisses the ultimate value of progressive trends within law, he perceives the trend toward rule relaxation in contract law as signalling the reintroduction of a merciful quality for adjudication.[126]

The problem is that Kennedy fails to provide a realistic access to the legal practice, i.e. to the courts. His critical theory concentrates inordinately on theory at the expense of practical efforts. It is wrong to reduce contract law to a strict set of rules and especially it is a blunder to equate rule adjudication to moral justification. But is it not also misleading to completely replace legislated contract law with judge's will?

Due to the very character of the enterprise, it may be

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126. ibid. p.1740,"the essential idea of rule relaxation is that of mercy."

an excessive demand to ask CLS to give a systematic theory which could be applied to legal practice. However, is it not reasonable to ask Kennedy the question of how to be good "parents" or say, a good judge, lawyer, legislator or contractor etc. in practice? Although he concedes that it is, Kennedy offers only a tautological response --- in social praxis.[127]

3.2 A New Ideal of Contract Law

___ Collins' Immanent Critique

When G. Gilmore proclaimed The Death of Contract,[128] he might not have been aware that the death of an old thing is pregnant with the life of a new thing. Five years later, when P.S. Atiyah tells the story of The Rise and Fall of Freedom of Contract[129], most legal scholars start to consider what might be said to come after the fall. During the past decade, there has been a remarkable resurgence in theoretical scholarship of attempts to explain and justify

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127. In his later essay "Distributive and Paternalist Motives in Contract and Tort Law, With Special Reference to Compulsory Terms and Unequal Bargaining Power" 41 Maryland Law Review, p.563, Kennedy argues for Paternalism as a positive theoretical foundation for modern contract law.

128. Grant Gilmore The Death of Contract, (Columbus, Ohio: Ohio State University Press, 1974)

129. P. S. Atiyah The Rise and Fall of Freedom of Contract, (Oxford: Clarendon Press, 1979)

the law of contract from various perspectives. The concept of promise, consent, efficiency, distributive justice, and the new paternalism have been offered as explanations and justifications for the new possible models of contract law, but as ones that are more than simple modifications of the traditional structure.

In The Law of Contract,[130] Hugh Collins offers his own reconstruction of contract law. Collins' work is impressive in the following two senses. First, like Kennedy he rejects the picture of contract law as an autonomous area of legal argument, separate from issues of moral, social and political value. On the contrary, he maintains that issues in contract law are inextricably intertwined with those values.[131] It is important to note that for Collins moral and political issues are not merely an interesting addition to traditional legal reasoning, as is evidence for justification in other texts.[132] Rather, contractual issues, according to Collins, cannot be adequately understood except in terms of competing and often contradictory values. Second, although Collins is influenced by the critical legal studies movement,

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130. Hugh Collins, The Law of Contract,(London: weidenfeld and Nicolson, 1986)

131. ibid. preface, at x.

132. Fifood and Furmston Cheshire, Law of Contract, 11th. ed. (London and Toronto:Butterworths, 1986), also C. Fried, Contract as promise, supra note.

especially by Roberto Unger's vision of contract law as competing principle and couterprinciple,[133] he does not accept the anarchist attitude of CLS towards contract law. Kennedy attacks on contract law to reveal a deeper contradiction within the modern social welfare state, and he turns to an appeal for social praxis as the determining criterion for the judge's mind.[134] Collins, on the other hand, proposes a new approach to connecting legal doctrines and social values, and tries to reconstruct a new model of contract law on the basis of a competing set of ideal values.

In the following, I will first describe the conflict between classical and modern contract law; then, the new model of contract law will be presented in the light of an ideal value. Finally, I will make several critical notes.

According to Collins, there are two interpretive models by which to outline classical and modern visions of contract law. They are described as the "facilitative" and the "regulatory" models. By "facilitative" model Collins refers to the classical vision of contract law. This model is premised on an ideal of "justice in exchange," that is, "a deeper faith in the justice of an order of wealth power

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133. Collins acknowledges that Unger's "influence upon the text... is pervasive." See R. Unger, Law in Modern Society. (New York: Macmillan, The Free press 1976), note the notion of relationships of dependency comes from Unger, also see Unger's critical legal approach, supra note.

134. See, Kennedy's two essays, supra note

established through exchange relations." [135] This model is based on the classical theory of free market --- that is, the free market is the most effective mechanism to promote substantive values of equality and reciprocity. This model is associated with the liberal ideal that permits individuals to pursue voluntary choices in the marketplace and that takes the concept of voluntary consent as the birthplace of binding contracts.[136] In Collins' view, as the dominant form of exchange shifted from the discrete transaction to the complex relation, the ideal lost its explanatory force. Three ideals of justice underlie the classical model: liberty, equality and reciprocity. Liberty refers to the freedom of contract, equality means the belief that the free market respects success in trading, but not social rank or military might, and reciprocity is the requirement for an exchange of value in a binding contract. Within the classical facilitative model, contract law was a set of technical judicial rules, which were separated from politics and morality and were applied by an impartial judiciary.[137] The function of these technical rules was to provide distinct boundaries for private action and political legitimacy for the judiciary.

To that model, Collins responds,"There has been no

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135. ibid.p.9.

136 ibid.p.8

137. ibid. p.16

greater error in the history of legal thought than the belief that the technical rules are exhaustive of the standards guiding judicial action."[138] In this regard, both Collins and Kennedy argue against legal formalism.

By the "regulatory" model, Collins refers to the modern vision of contract law. The regulatory model represents communitarian values associated with the growth of the welfare state, namely: "....assistance to the weak and handicapped., fairness in the distribution of wealth, and altruistic concern for the interest of others."[139]

Contrary to the classical belief in the free market, the modern regulatory model of contract law abandons the concept of voluntary consent as the only test of contractual responsibility. Collins argues that the classical model actually encourages the oppression of weaker parties, whereas within the modern model courts ensure the substantive fairness of market outcomes which are otherwise based only upon a notion of economic relations as essentially antagonistic, so that in the regulatory model "contract parties accept the virtues of accommodation and co-operation instead of standing on their rights, and insisting on their pound of flesh."[140]

The essential difference between the two models is not

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138. ibid.

139. ibid. p.1.

140. ibid. p.14.

only the general attitude towards the function of the market, but more importantly, the two competing sets of values. Collins claims, that "whereas the ideal of the justice of exchange perceived the virtue of the market order in its respect for the values of liberty, equality and reciprocity, the modern law insists on a proper balance between, on the one hand, a respect for individual dignity and equality, and on the other hand, a fair distribution of wealth, the avoidance of unjustifiable domination, and a duty to respect the interests of others."[141]

Due to the establishment of communitarian values, and the changes in the relationship between contract law and market, modern contract law has gone through a "quiet revolution," which is a double transformation of the form and the content of contract law. First, the unwillingness on the part of society to accept the unfair distribution of the facilitative model results in legislative regulation of a variety of relationships in fields such as labour law, insurance law, consumer law, etc.

Second, the injustice flowing from the passive application of formal rules moves judges actively to manipulate doctrines to achieve substantive fairness, such as in the doctrine of inequality of bargaining power. As a result of the quiet revolution, the discourse of contract law cannot be separated from moral and ethical discourse

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141. ibid. p.15.

and, "the modern law draws no clear distinction between legal and political and moral argument."[142] There has been a movement from formal to substantive rationality, and instead of the view of law as a closed set of rules, "legal discourse now takes place at a higher level of generality in terms of principles and broad standards which reveal their value-laden message."[143]

Collins' discussion of the facilitative model and the regulatory model is meant to show the sharp distinction between classical and modern contract law with respect to four perspectives: market facilitation vs. market regulation; separation of law and morality vs. connection of law and morality; formal rules vs. substantive policy; and finally, an individualist set of values vs. a communitarian set of values. The new model Collins articulates on the one hand provides a foundation for his critique of the classical model of contract, and on the other, has been proffered as a comprehensive social theory for reconstructing contract law. In lights of these old and new themes, Collins proceeds to explore their manifestation in contract law by asking the following questions: how are contractual obligations created; when does contractual obligation come into effect; what are contractual obligations; and who is bound by a contract? The different

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142. ibid.p.20

143. ibid., at preface ix

answers to these questions clearly illuminate the two visions of classical and modern values.

As for the source of contractual obligation, classical theory holds that consent (intention, will, etc.) is a sufficient condition for contractual obligation, whereas Collins argues that consent is required to be inferred from conduct, and that the different sorts of case of consent inferred from conduct show that the real foundation for the decision is the fairness of the transaction. Based on the value of fairness, modern law develops a doctrine of inequality of bargaining power.[144]

As for the moment of contractual obligation, the classical model uses the concepts of offer and acceptance, whereas the modern view takes contract as a complicated notion, i.e.one involving the communication of contractual parties, the liability imposed by courts and the influence of social policy. These elements invoke a balance between private autonomy and communitarian values.[145]

As for the content of contractual obligation, the classical model reduces it to what the parties have consented to, while modern law demands erecting instead a duty to bargain in good faith. Various duties stipulated in modern law invoke the value of cooperation.[146]

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144 ibid. p.56, 58, 66.

145. ibid. p. 77, 79, 82, 84.

146.ibid.89, 95.

As for the range of contractual obligation, classical contract law is based on the individualist view--- contractual parties are fully responsible for their benefits as well as their losses; whereas the modern rationale expands the notion of a "party", and require "a more public orientation which imposes a scheme of social organization upon individuals." [147]

Collins is keenly aware of the fact that most scholars in Critical Legal Study movements fail to articulate a new model which can be applied in practice to contract doctrines. Thus, Collins concentrates his efforts on illustrating how values of fairness, paternalism and cooperativism appear through and are connected with contract doctrines.

The value of fairness refers to movements directed toward an equal distribution of wealth and power in society. Collins discusses fairness with respect to the contract doctrins of unconscionability, unequal bargaining power and mistake. Under those doctrines, the courts impose fair bargains by focusing both on the negotiation process and the substantive results of the bargain. However, since "the courts use the market as a yardstick for judgements about the fairness of the terms", the law of contract is unlikely to be radically changed. Collins argues that modern society has rejected the political view that the

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147. ibid. p.114

unregulated market results in a fair distribution of wealth and power.[148] Hence, in the welfare state, the major means to arrive at fairness is through social welfare legislation and contract law is a minor means to redistribute the wealth of society. "The modern norm of fairness rests upon an adjustment of the distinction between the ordinary and the aberrational market."[149] That is to say, courts regulate fairness indirectly in ways that are tied to other values, such as paternalism and cooperation.

Paternalism is another value which is used for explaining recent developments in contract law. There are two senses of paternalism. In its broad sense, the discourses of paternalism deal with classes of persons and standardized transactions. "The law imposes a pattern of rights and duties upon the parties and limits their power to rearrange that pattern by contractual agreement."[150] In its narrow sense, paternalism "invalidates contracts which subvert the shared moral standards of the community, but without imposing ideal models of contracts upon the parties."[151]

According to Collins, paternalism appears in models of contract law bearing both broad and narrow senses.

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148. ibid.p. 139-114

149. ibid. p.148

150. ibid. p.115

151. ibid.

"Courts employ moral standards not merely to disallow certain kinds of contracts, but to establish patterns of acceptable relationships."[152] On the one hand, paternalism understood as a means of preventing strong parties from dominating weaker parties fits well with the value of fairness. On the other, paternalism as the means of "regulating the relation of power between parties to a contract with morally unoffensive purposes"[153] conforms with to the idea that a doctrine must be understood in its social context and not in its isolation. According to Collins, paternalism is not merely a moral notion but both a procedural and a substantive requirement. A contract is unenforceable only if there is a problem in the bargaining process and with the substance of the transaction.[154]

But for Collins, Cooperativism is the most important value for reconstructing contract law. The function of Cooperativism is to replace the priority of individual liberty with a principle which promotes a communitarian ideal of concern for the interests of others (altruism). By giving reference to the performance, modification and termination of contracts, Collins illustrates how current law is expressed in the spirit of cooperation. For example, Article Two of the Uniform Commercial Code allows parties

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152. ibid. p.116.

153. ibid. p.117

154. ibid.p. 118, 120.

to modify their contracts to meet the exigencies they face.[155] More importantly, the duty to cooperate and the rules that encourage cooperation permeate all aspects of performance considerations about contracts. Instead of determining the allocation of risk by "intent or will" of the parties, cooperativism asks courts to require the parties to cooperate and arrive at a reasonable accommodation. Courts may revise the pricing formula in long term contracts, and allow termination of any apparently perpetual arrangement which may achieve unfair results. In order to encourage cooperation, the courts do not care about the parties' label; rather, judges themselves decide independently about whether a breach warrants termination.

Compared with other theories we have discussed, I believe Collins' immanent critique of classical contract law is more profound. He does not regard contract law as an isolated legal institution but as a legal discourse deeply founded on an ideological system of values. Classical contract law espoused three values, liberty, equality and reciprocity, while modern contract law is characterized by the three ideals of paternalism, fairness and cooperativism. Classical values are bundled by the ideal of "freedom of contract" or (right-wing) libertarianism, whereas modern values are tied up with communitarian and

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155. ibid. p.168

welfare state ideals. Thus viewed, the evolution from classical to modern contract law is essentially a transformation from libertarianism to communitarianism. Both legal evolution and ideological transformation are the reflection of social change, that is, a movement from primary capitalism to the more advanced welfare state. At very least we can say that Collins' critique appears attractive on the level of this comprehensive social context. This is, I think, the important aspect that makes Collins' critique impressive on other levels as well.

Collins does not only give a social account of contract theory, but also gave an impressive discussion of the important feature of more specific contract doctrines themselves. His discussions are comprehensive in the sense that they attempt to provide a framework for understanding large bodies of doctrine. With this framework, he tries to show how contract doctrines are understood in terms of classical theory and how the applications of classical lawyers prove that doctrines cannot be explained truly or fully in the dimmer light of traditional values. Then he shows how modern contract theory addresses the issue and gives an explanation of those same contract doctrines in terms of new ideals of value. In short, his acknowledgement of social values and his discussion of the connection between social ideals and contract doctrines brings about a new vision of contract theory and a new model of contract

law.

Now we turn to the question of how to evaluate Collins' new model of contract and his theory of contract law. As a reference for doing this, some criticisms have been made in recent reviews of Collins' book on contract. The most prominent among them are summarized as follows. First, it seems premature for Collins to announce the death of the classical model of contract. For example, in England, most of the contracts are interpreted on the basis of the supposed intentions of the parties, and little attention is paid to the fairness of the transactions.[156] Second, Collins' case studies seem to be a bit too selective. These cases either are in favour of his new theory of contract or are misinterpreted by him.[157] Third, there is a gap between his theory and actual legal practice. People generally wonder "how often judges actually depart from strict, intent-based liability and how much they were influenced by the values Collins identifies." [158]

However, instead of asking those more concrete questions, my comment will focus on one general question: what is the relationship between the classical model and

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156. F. M. B. Reynold's review, L.Q.R.,102, 1986, p.629

157. M.H. Ogilive's review, Can. Busi.L.J.13, 1987-88, p.127

158. J. M. Beermann, Contract Law as a System of Value, Boston Univ. L.R. 67,1987,p.574

the modern model of contract law ? Let us first look at Collins' description. He writes: "In order to grasp the nature of the modern law of contract, we must depart from traditional accounts of the law both in pure description of the substance of the norms and in their individuation."[159] That is to say, the classical model cannot accommodate the new developments, and there is a paradigm change between classical and modern contract law. In the following discussion, I suggest, no-one can deny that contract law has gone through a great change, and that there is a conflict between traditional and modern contract law. However, the change and the conflict do not mean that there is a revolution in the law of contract. My discussion will be divided into two parts: legal form and legal substance.

According to Collins, there are two competing sets of values in the field of legal substance, libertarian and communitarian values. These two sets of values do not have only symbolic or theoretical significance, and they are manifested in and through the whole range of doctrine of contract. I think Collins does forcefully show this to be a fact. My question concerns whether these two set of values are so conflicting that they cannot accommodate each other?

Theoretically, there is little doubt about their prima facie conflict and distinctness. However, when they are applied in the theory of contract law, their conflict is

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159. Collins, supra note 33,p.21

not so rigid. The communitarian values Collins identifies contain fairness, paternalism and cooperation, specifically for the reason of preventing the stronger from dominating the weak, to redistribute unequal wealth and power,and to encourage a concern for both parties' benefit rather than one's own interest. All of these values point towards one aim, that is, to limit excessive individual freedom but not to obliterate legitimate individual rights. In fact, the classical notion of consent or intention does not only mean to promote absolute individual freedom, but it also means to respect legitimate individual legitimate rights. It is one extreme if consent or individual will is to be taken as the sufficient condition of contractual obligation. It is another extreme if individual interest could be frequently infringed by the regulatory market or state intervention. Under a system of market exchanges, individual interests cannot be separated from public interests. Therefore, individual voluntariness and cooperation are always the two sides of the same coin, even though they have quite different features. The evolution of modern contract law reflects a the decrease of libertarianism and the increase of communitarianism, but it does not mean one instead of the other. When Collins argues in reference to their conflict, I think he omits their more common function. Beermann, in the second part of his review, gives four types of example, and tries to show how in legal practice

individual intent and collective cooperation harmonize, and how difficult it is if we try to draw a clear distinctions between individual and public interests, or between the two sets of values in real legal cases.

Within the domain of legal form, Collins claims that there is a transformation from technical rules to flexible standards, or, say, a movement from legal form to legal substance. Again, Collins does show this fact in his discussion. The question I raise here concerns whether this transformation is a paradigm change, namely, from formalism to substantivism?

Let us first assume that there is a completely new model of contract, which is based entirely on communitarian values. In order to protect the weak, to redistribute social wealth, and to cooperate with each other, do we need some sort of distinct legal procedures and rules? My answer is "yes". It is wrong to think new substantive values are enough by themselves. There may be old procedures and rules, there may not be.[160] As my critique of Kennedy's theory mentions, there is nothing wrong with the legal procedures and rules themselves, unless we rely upon them excessively. In this sense, legal formalism is equivlent to legal substantivism. When Collins tries to connect the communitarian shift with a move away from legal

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[160] I will give my own view about this issue in chapter IV, section 2.

formalism, he almost forgets that there are definitely separated functions separating legal form and substance. The interesting thing is that when Collins uses examples to show modern contract moving toward communitarian values, these examples are just explained in terms of another set of legal procedures and rules, such as The Unfair Contract Terms Act (UK) 1978 and The Consumer Credit Act (UK) 1974, etc.. This fact at least shows that legal form and substance have their unreplaced functions, although they are related with each other as Collins and Kennedy have shown.

The revolution of contract law Collins argues for is expressed in two aspects, legal form and legal substance. My suggestion above is that there is an evolution but not a revolution with respect to legal form and substance. Therefore, his claim of paradigm change cannot be sustained. I think, part of the reason Collins makes this wrong claim is that, on the one hand, he clearly recognizes the connection between law and ideology, and on the other hand, he fails to see that both law and ideology are the products of a social political and economic system. When a society has not gone through a paradigm change, or, say, when a society's change is only evolution but not revolution, the whole legal institution as well as ideology cannot go through a radical change. Even when there is a revolutionary change from the classical to the modern

contract model, the new model will still keep some old values and doctrines and rules. This is just common sense.

3.3 The Problem with the Critical Legal Approach

Nothing is more characteristic of the critical legal approach than the revelation of inconsistency and inderterminacy in contract. Theorists in this approach, such as Kennedy and Collins, try to trace the controversy of contract law back to the incoherence of libertaritian legalism with social and political theories. Furthermore, from the death of the classical contract law and the contradiction of modern contract law, they intend to undermine the libertarian values and replace them with communitarian values. Based on the new social values, they (especially Collins) reconstruct an ideal model of contract law. Within the new model, contract law is no longer regarded as a pure legal institution; rather no clear distinction is drawn between legal, moral and political issues. Within the new model, the law of contract is no longer constituted by a set of value-free legal rules, but instead by general value-laden standards and principles.

It is undeniable that the critical legal approach reveals the essential relation between contract law and social ideology, and perceives the transformation from the

classical model to the modern model of contract law. However, we must clearly identify two different questions: on the one hand, contract law, as a form of social context, is closely related with or reflects moral, political and ideological issues; on the other hand, contract law, as a legal institution, has its self-identity which is full of elements caught in and transmitted by legal tradition over generations. That is to say, however it may change with respect to its form and substance from time to time, contract law still has its basic "being", which characterizes something as contract law. In other words, contract law, as other complex traditions, e.g. language, exists in a situation of present and past. As Wittgenstein says: "Our language can be seen as an ancient city: a maze of little streets and squares, of old and new houses, and of houses with additions from various periods; and this surrounded by a multitude of new boroughs with straight regular streets."[161]

When the critical legal approach claims that there is a revolution in contract law, and tries to design an essential different model of contract law, they have not aware that they threw the baby out with the bathwater. There is nothing wrong with contractual rules, and also there is nothing wrong with the legal procedures. To deny

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161 L. Wittgenstein, Philosophical Investigation, 3rd. (Blackwells, Oxford, 1967) 8.

the rules and procedures is equal to denying the existential rights of legislatures, lawyers and judges. In fact, there are two different aspects in contract law. The critical legal approach focuses one aspect and forgets the other.[162]

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[162] See chapter 4.2, the constant notions and variable notions.

CHAPTER IV PHILOSOPHICAL REFLECTION ON THEORY OF CONTRACT

In the previous three chapters, I have attempted to present and to assess respectively three major approaches in contemporary jurisprudence on contract law. In my presentation, I tried to show that the three approaches provide distinct interpretations and understandings of contract law. In my assessment, I intended to demonstrate that, for various reasons, none of them offer a fully adequate basis for interpreting and evaluating comprehensively or coherently the nature of contract law.

In this chapter, I am going to put these theories in a broader framework, so as to discuss them collectively and evaluate their comparative successes and failures. The first section is meant to clarify some common problems among contemporary theories of contract law. Various perspectives and functions of previous theories of contract law will be discussed from the hermeneutical viewpoint. My use of the term "hermeneutics" is not meant to broach those more speculative problems related to the philosophy of hermeneutics; rather, I mean only to refer to the notion of interpretation in general.[163]

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[163] Further to this point, let me explain the use of the term "hermeneutics". Note that I do not claim that hermeneutics is philosophically correct or that the concepts of hermeneutics are contsraints on the construction of philosophical theory in general; rather, I use some concepts of hermeneutics as an interpretative tool to analyse and to clarify the problems in contemporary

The second section deals with the objects to which a theory of contract law attends. Some fundamental notions and their relations will be discussed in the light of coherence theory. I take it that the coherence approach is a philosophically defensible way to understand the nature of an epistemic system.[164] Based on a coherence approach, a tentative framework for understanding the nature of contract law will be articulated. Note that the framework is not a new theory of contract law; rather, it is a meta-theory of contract law, by which I discuss the necessary conditions for understanding the nature of contract law comprehensively and coherently. The third section will be a brief summary of the whole thesis.

4.1 Perspectives and Functions of Theory of Contract --- A Hermeneutical Examination

From a hermeneutical viewpoint, any theory of contract is an interpretation of contract. By interpretation, theorists try to understand the meaning of contract law. In this broad sense, a contract theory is a result of interpreting contract law-or a particular understanding of contract law. The notion of interpretation, which I will

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theory of contract.

[164] When I talk about coherence theory in general, I have BonJour's version of coherence theory in my mind. However, there is a subtle difference between his theory and mine. See infra note 184.

borrow from Hans-Georg Gadamer, contains or is closely tied with the following three notions: horizon, text, prejudice.

The meaning of "horizon", according to Gadamer, is "The range of vision that includes everything that can be seen from a particular vantage point"[165], or what I will call a "perspective". From different perspectives, we capture different horizons. In other words, a perspective is a starting point of an interpretation. In this sense, a perspective is a prejudgment and thus a horizon is preconceived by a system of prejudgment. Every horizon is correspondent to its system of prejudgment.

The notion of "text" refers to the object of interpretation. Gadamer says, "Hermeneutics must start from the position that a person seeking to understand something has a relation to the object that comes into a language in the transmitted text and has, or acquires, a connection with the tradition out of which the text speaks."[166] It is clear that the object of interpretation, namely a text, has an objective and historical existence in a fixed set of inscriptions in a language, inclusive of such works as classics, the Bible, Plato's corpus, literary works and legal texts. However, the meaning of a text is not determined merely by the contingencies of its author and

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[165] Hans-Georg Gadamer, Truth and Method, (Sheed & Ward. London, 1975), p.269

[166] ibid. p.262

whom he originally wrote for. "It is always partly determined also by the historical situation of the interpreter and hence by the totality of the objective course of history".[167] That is to say, historical situation plays an important role in understanding text.

The central part of the notion of historical situation, for Gadamer, is revealed in terms of prejudice. Viewed hermeneutically, any interpretation of text "involves neither 'neutrality' in the matter of the object nor the extinction of one's self, but the conscious assimilation of one's own fore-meaning and prejudices".[168] It is noted that prejudice is not used in its traditional pejorative sense; rather, it is interpreted as "the fore-structure of understanding",[169] in the sense used by Heiddegger. Any interpreter in a particular historical situation has his prejudice unconsciously. What is to be brought to our attention, for Gadamer, is the need to make interpreter <u>aware</u> of this very fact, "so as to check them and thus acquire right understanding from the thing itself."[170]

According to hermeneutics, although we interpret the

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167 ibid. p.263

168 ibid. p.238

169 Martin Heidegger, <u>Being and Time</u>, trans. by John Macquarrie and Edward Robison (Harper & Row, Publishers, New York, 1962), p. 191

170 see supra note 1, p.239

same text, we may still get different meanings of the text, because of our different perspectives (prejudgment) and our distinct prejudice (fore-structure of understanding). That is to say, all three different approaches of contract theory interpret the same text, i.e. contract law, but they interpret it differently in the sense that they have respectively distinct perspectives and prejudices. Therefore, let us now turn to those questions of what are these perspectives and prejudices, and how such differences affect certain successes and failures.

Each of the three approaches to contract law obviously adopts a single independent perspective. First, the promise reinterpretation approach takes contract law as enforcing promises. When the traditional theories of promise came to be in crisis, theorists in this approach tried to seek a new foundation for the notion of a promise, i.e. Atiyah's social admission (rule), Fried's moral trust, Barnett's legal entitlement. Second, the economic ground approach to contract law concerns itself with the promotion of some goals. For Posner, contractual action is economic activity, and in a suitably economic horizon, the function of contract law is viewed as that of maximizing economic efficiency. For Kronman, contract law is essentially an instrument for redistributing the wealth of society. Third, for the critical legal approach, contract law is viewed as a by-product of political ideology and social value. In

Kennedy's horizon, contract is nothing but a conflicting picture of traditional structures of individualism versus contemporary institutions of altruism. In Collins' view, the libertarian set of values in the classical model of contract law is collapsing, while the communitarian set of values is growing as the modern model of contract law.

From these different approaches, it is clear that a specific perspective determines to a great extent the horizon of a contract theory. In this sense, what is to count as success and failure for each theory is more or less predetermined by the perspective. An obvious advantage of the single-perspective approach is that it provides a unity to the field, and brings into view an elaborate chapter of a whole text.

However, two questions remains in the single-perspective approach. The first one is, could the law of contract be understood in terms of one selected perspective? Or, say, could we have a sufficient and comprehensive understanding of contract law from one particular perspective? The second, is it possible for us to have a full understanding of one notion or one aspect of contract law before we know what the essential nature of contract law is? I think most of problems with the three approaches are related to those two questions. In other words, methodological inadequacy is one of the most important reasons for each theory's internal problems.

Contract law, on the one hand, is itself a very complicated legal institution and, as I have indicated at the end of each of the previous chapters, the formation of obligation is affected by various elements; it is at some point undeniably related to other issues, e.g. moral, social, economic, political. Therefore, it is hard to understand contractual obligation from any single perspective. On the other hand, human beings such as judges, lawyers and contractors are not the single-minded machines each theory would pretend them to be. They can have more than one purpose for their activities or institutions, and they in one way or other strive to reconcile or balance these purposes when they conflict.

The issue of perspective is essentially related to the issue of prejudice, namely, the choice of perspectives is related to the interpreter's or theorist's fore-structure of understanding. Within the domain of legal study, I take prejudice to mean the interpreters' (for example, lawyers', judges', economists', philosophers') predefined fore-structure of knowledge, language and understanding. Distinctive prejudices constitute the different purposes of their theories, and therefore different functions for contract theories are presented. For example, surely it is no accident that the critical legal approach was a movement that grew out of a uniquely "60's" perspective in America. The particular social background produces the special

theoretical interest of the critical legal approach, and thus endows the critical legal approach with the function of justification.

Gerald Fridman has observed that one of the general problems in contract theories concerns the issue of "whether philosophers and lawyers are speaking in different languages when they talk about legal issues like the nature of contract and contractual obligation".[171] He suggests that, while philosophers focus on various theories for recognizing and enforcing contracts, judges and lawyers are concerned to determine whether a legally binding arrangement has been made. This suggestion, along with others,[172] seems to imply that theories of contract law can be developed for different purposes, or, say, theories tend to serve different functions. These different functions of theories express theorists' different interests and purposes, with the effect that indeed they are expressed through different "languages". For example, if we compare the economic ground approach with the critical legal approach, we can see clearly that they deploy entirely different languages (terminology, expression and

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171 Gerald Fridman, "On the Nature of Contract", Valparaiso Univ. Law Review, Vol.17,p.627

172 For example, Roger A. Shiner says, "We all yearn for something better --- the politican wants the perfect code, the litigant the perfect verdict, the academic the perfect theory, the judge the perfect rule", see supra note, p.106

principle), although they seem to talk the same subject-matter --- contract law.

At least three distinct functions can be served by a theory of contract law: prediction, explanation, justification.[173] It is noted that in the following discussion of the three approaches, each of them does not have purely one function only, although each essentially relates to one particular function more than the rest.

The function of predication refers to what the count would do were they confronted with the arrangement, so as to determine the practical matter of whether a legally enforceable arrangement has in fact been made. If the primary function of a theory is predictive, then it is more likely to be presented according to the standard legal terminology in which practitioners are already fluent, and its arguments to be heavily based on the existing body of practical legal reasoning. The promise reinterpretation approach belongs to this sort of theory. As we have seen before, the central issue of that approach is the enforcement of promises. The necessary condition for a promise is a promise made by parties who intend a legal bond. In order to avoid the subjective version of the classical theory of contract, the notion of promise is

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[173] This classification is originally presented by Michael D. Bayles, in his paper "Introduction: The Purpose of Contract law", Valparaiso Univ. Law Review, Vol.17, p.613. The classification and its meaning are adopted and modified, and changed in some sense.

reinterpreted by those theorists. They try to find some sorts of elements implied in the notion of promise, but different from purely individual intention. In other words, they expand the intent and extent of the notion of promise into more theoretically convenient conceptions, such as socially bound promises, morally bound promises, legally bound consent.[174]

However, all these theories are close to traditional contract law doctrines, because their original motivation and final designation are to provide an expanded and reinterpreted notion of promises for courts to distinguish enforceable from unenforceable promissory obligations. Therefore, the terminology and statements are close to those found in judicial opinions;[175] moreover, the ideology underlying their doctrines is the freedom of people to make arrangements as they desire. The advantage of the predictive function is the endorsement it receives by appealing to an already acknowledged theory of contract with practical significance. But it is rather weak methodologically for the purpose of understanding the nature of contract. As I have discussed already, the nature of contract law cannot not be understood in terms of one

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[174] See chapter 1 and accompanying text.

[175] If we look at the promise reinterpretation approach again, we can find that theorists under this approach speak in the way by which as if they were counts making decisions.

particular perspective. Although practical reasoning might help adjudication in many ways, it cannot justify the rationale behind tha law of contract.

The function of explanation refers to the understanding of how contract law is operative in various adjudications, and what role contract law plays more generally in a society. At the level of explanation, on the one hand, the positive approach is closely related to the normative one, and the question of what is going on in the court's decision is connected with the question of what contract law should be. On the other hand , a positive explanation is tied to the function of prediction, as we see when Posner uses economic efficiency to identify the enforceable and unenforceable contract. A normative explanation is related to the function of justification, as when both Posner and Kronman try to justify the law of contract by 'external' standards, such as maximizing economic value or promoting distributive justice. The terminology and statements are rather hybrid, being provided on a very selective basis from the larger pool of both legal and economic fields (or other areas of social science, i.e. sociology, politics, ethics).[176]

The function of explanation starts in a rather uncritical way with a fore-structure of understanding and knowledge (prejudice), and picks up one particular standard

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[176] See Chapter2 and accompanying text.

to evaluate the law of contract. It is undoubted that the function of explanation plays an important role in a contract theory. For example, due to the very differences between theories with this primary function, it makes us aware that contract law plays different roles in society and that contract law cannot be simply viewed as a purely legal business. However, two questions arise about the function of explanation. First, how much explainable force does this approach have, if any, in a real court's decision? That is to say, the essential relationship between contract law and economics (or whatever) needs to be verified. Second, to what extent are the evaluating standards provided by this approach justified, or say, what is the reason which permits us to pick one yardstick rather than another? These theories lack the explanatory force to sufficiently explain themselves when pressed to account for these sort of concerns.

The function of justification refers to how to justify contract decisions, doctrines, principles and rules, for the purpose of revealing what the more fundamental rationale behind contract law is. To quote Shiner, "A derived statement is defensible when it is derived from morally sound premises. Justification has to do with 'defensibility'. 'Justification' means 'morally justified';

the decision is the morally right decision to take."[177] According to Alexander Peczenik, there are two different levels of justification: contextual and deep justifications. The former are "those provided for decisions when the results of the legal institution unambiguously require a particular decision",[178] and the latter are "those that begin with fundamental principles of morality".[179] What I will emphasize here is that the function of justification requires both levels of justification, and more, that contractual doctrine cannot be justified unless its view of the nature of contract law is also justified.

The critical legal approach could be characterized by the function of justification. What Kennedy and Collins do is to give contract law a deep justification, or at least they require contract doctrine to be 'deeply justified'. According to Kennedy, contract law is based on radically conflicting ideologies of individualism-rule versus altruism-standard (deep justification), and therefore all doctrines and rules of contract law are in isolation unjustified ones(contextual justification). For Collins,

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177 Roger A. Shiner, see supra note, p.88, paraphrasing D. Lyons, "Justificaation and Judicial Responsibility", California Law Review 72, 1984, p.178 and Derivability, and the Justification of Judicial Decisions", The Monist 68, 1985, p.325.

178 See R. A. Shiner, ibid. p.88, n.3

179 ibid.

the whole task of contract theory is to justify the transformation from the classical model to the modern model of contract law, and to justify the ideal model of contract law in terms of communitarian set of values.[180] This is true even for Collins' 'immanent' critique, which one would expect to be close to actual legal practice.

Although the function of justification provides a deep understanding of the nature of contract law, it is still questionable how much practical significance theories with this function have. Unlike functions of prediction and explanation, the critical legal approach has been largely ignored by most lawyers and judges.[181]

The analysis of the perspectives and functions of a contract theory implies two different levels of suggestions. The first one is that it is important to recognize the particular perspective and the distinct function of a contract theory. The significance of this recognition includes two aspects. On the one hand, one cannot make sound theoretical claims unless he or she is clearly aware of what perspective he or she takes, and what function that theory aims to fulfill. For example, Posner's

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[180] See Chapter III and accompanying text.

[181] D. Kennedy adimited that there is few practioners in the Critical Legal Studies Movement, See Interview with Kennedy, supra note . Joe (one of graduate students in our department) told me that his father, a senior judge, even never heard of this term CLS, isn't it sad for those ambitious theorists?

theory provides an explanation for contract law from neo-classic economics. It is misplaced for him to make a predictive claim, e.g. economic efficiency is the sufficient yardstick for the courts to distinguish an enforceable contract from an unenforceable one. On the other hand, one cannot make an adequate criticism of a theory unless its perspective and function are duly identified. For example, it is rather confusing to merely claim that a criticism based on philosophers' language could be directly applied into the context of judges' decisions on adjudication, etc. In short, the first suggestion is meant to provide a broad theoretical foundation for various theories of contract law: one upon which they may be intelligibly discussed and debated.

The other suggestion is that in order to obtain a relatively comprehensive and coherent understanding of the nature of contract law rather than only partial knowledge of contract law, we need some sort of theory which can overcome the inadequate methodology of single-perspective and single-function approaches, although we are clearly aware of that it is impossible (or at any rate unlikely)to have a contract theory which includes all perspectives and fulfills all three functions. Of course, providing this meta-theory is a really difficult task. Let us turn to the following section to discuss it in some detail.

4.2 Notions and Relations in the Theory of Contract --- A Coherence Approach

In order to seek a solution between a "one-side" and an "all-scales" theory, we have to turn to a coherence approach. According to the coherence approach, on the assumption that it is impossible for us to find a final Archimedean point upon which to build our whole system of knowledge, what we can do is to define some basic elements and to establish their relations within a given system, and therefore obtain relatively comprehensive and coherent knowledge about a given object.[182]

It is not an arbitrary condition to require contract theory to follow a coherence approach. In contemporary epistemology, foundationalism is confronted with a serious crisis. The problem of infinite regress makes foundationalism functionally dead. Nevertheless, as a profound tradition in western thought which can be traced back at least to the age of Enlightenment, foundationalism persists as a strong influence in the area of contract theory.

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[182] This paragraph and following one are compressed. The basic idea comes from the book Antifoundationalism & Practical reasoning --- Conversation between Heumeneutics & Analysis, ed. Evan Simpson, (Academic Printing & Publishing, Edmonton, Alberta, Canada,1987) introduction and part three. Also see Laurence BonJour, The Structure of Empirical Knowledge, (Harvard University Press, Cambridge, Massachusetts, and London, England,1985)

To some extent, the general problem with all three approaches to contract law is related their foundationalist orientation. Each theory tries to find some sort of Archimedean point from which to understand the nature of contract law, such as, for example, social admission, moral conscience, consent, economic value, distributive justice, ideology, social value. There might be nothing wrong with these points in themselves, but the foundationalist methodology is inadequate to provide a proper understanding of their relation to the nature of contract law. There are lots of problems involved in that approach, such as how to justify the Archimedean point, what are the relationships among these different points, etc. In this sense, there is a problem of infinite regress.

In order to escape the predicament, the other apparent alternative is a coherence approach. A coherence approach abandons any attempt to find some final foundation for a theory, and turns to the question of how well a body of ideas "hangs together". BonJour explains, "It is reasonably clear that this 'hangs together' depends on the various sorts of inferential, and explanatory relations which obtain among the various members of a system of beliefs, and especially on the more holistic and systematic of these."[183] Applying this coherence idea into contract theories, I would make a slightly different claim: if a

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[183] L.BonJour, supra note 182, p.93.

theory of contract is to be relatively coherent and comprehensive, it should satisfy the following conditions: First, it must have to do with a set of basic notions, which correspondend to a set of fundamental elements of contract law (object of theory); Second, all notions exist within the context of their relationship, and these relations and notions must be explained in terms of a holistic system.[184]

The first condition requires us to define a set of basic notions, according to the fundamental elements of the object "contract law". Contract law in its broadest sense can be generalized as four factual elements: contractual parties, contractual procedures, contractual contents and contractual social context. These four elements cover every domain of contract rules, doctrines and principles. Corresponding to these four elements, we have four notions of a contract theory: individual voluntariness, procedural legitimacy, moral fairness and social justification. Since these four elements of contract law are to be acknowledged as fundamental, we require that these four notions should be the basic ones for any truly comprehensive and coherent

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[184] The difference between BonJour and I may exist in the understanding of the notion of "basic notion". In order to avoid unnecessary troubles, I make the following claims: first, the basic notions in my context are not a final Archimedean point but a set of ideas or principles; second, the meanings of the basic notions and the role they play in a theory could be understood only in terms of a holistic system; third, the basic notions are correspondent to those elements of epistemic objects.

theory of contract. Let us consider them in this new light.

Individual voluntariness. A contract is voluntary to the degree that it is consciously and willingly chosen by the contractual parties involved. Voluntariness requires respect for individual intention, will and freedom. As voluntariness admits the degree, the greater the amount in any particular transaction, the greater the likelihood of the enforcement of the contract. However, voluntariness is a necessary condition but not a sufficient condition for a contract. That is, a contract will not be enforced without it, but a contract cannot be enforced solely on the basis of it. Here the classical idea of free contract is adapted with modifications entailed by the three other elements.

Procedural legitimacy. A contract is legitimate if the contractual procedures are legally completed. Legitimacy requires respect for the authority of contractual doctrines and rules and the seriousness of the court's adjudication. As legitimacy admits of degree, the more accurate the procedures of an agreement, the greater the possibility of enforcement. Legal legitimacy is also a necessary but not sufficient condition for a contract. Here, the classical legal formalism is absorbed with appropriate qualification.

Moral fairness. A contract is fair if the contractual content is fully understood by contractual parties, and each of the parties is not a "bargaining dwarf". Fairness requires that contractual parties have sufficient knowledge

to understand the context of their situation, including an ability to make a reliable judgement on the agreement's content and a foresight of its result. Again, moral fairness is not a sufficient but is a necessary condition.[185]

Social justification. A contract is socially justified if the exchanges of entitlements are permitted by a society and the social values underlying contractual transactions are justified by that society. Justification requires respect for the historicity and sociality underlying a particular transaction. Legal entitlement for contractual transactions should be as permitted in this society, e.g. a human body cannot be traded in Canada. The social values behind contractual transactions should not be contradicted by the mainstream of social conventions (moral, political, economical, religious, cultural,ideological, etc.), e.g. any contract involving anti-Moslemism is prohibited in most mid-east counties; contracts for the purpose of pornographic magazines and strip shows are illegal in China. Like the other notions, social justification is also

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[185] This claim should be modified as follows: personally I entirely agree that the substantive fairness is very crucial for a legally binding contract. In this sense, it seems to be able to serve a sufficient condition for a contractual obligation. But what I emphasize here is that fairness does not necessarily implies individual voluntariness or procedural legitimacy. In order to respect individual freedom and to respect legal seriousness, moral fairness has to be a necessary but not a sufficient condition for contractual obligation.

a necessary but not sufficient condition for a contract.

The four notions together constitute the sufficient condition for a legally enforceable contract and thus provide an adequate basis for understanding the nature of contract law.

The second condition involves dealing with the relations among these basic notions. The three basic relations among them are discussed as follows: the relation between core-notion and sub-concept; the relation between constant notion and variable notion; the relation between fundamental notion and holistic system.

The relation between core-notion and sub-concept.[186] By core-notion I refer to the above four notions of a contract theory. They are core-notions in the following ways. First, they are independent in the sense that one cannot be derived from another, i.e. namely from a contract's being voluntary we cannot infer that it is a legitimate, or fair, or justified contract. Second, they are primary in the sense that all other concepts relevant to contract law can be derived from these four notions,

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[186] I am fully aware that the following claims are to a great extend hypothetical. I also note that, in order to make these claims, I should give some kind of arguments such as, why there are four and only four core-notions, what essential relation between a core-notion and its sub-concept, etc.. However, for my present purpose (to articulate a framework of a meta-theory rather than a contract theory of contract, and to reflect philosophically on the contemporary theory of contract), I only present some theoretical relations and one particular model of these relations.

either directly or indirectly. The other concepts drawn from core-notions we called sub-concepts. For examples, duress and consent as sub-concepts are derived from the definition of voluntariness; the sub-concepts, terms, unenforceable contract and part performance are implied by legitimacy; reliance, promissory estoppel, capacity and mistake, are derived from fairness; and entitlement, property, non-disclosure, non-contractual duty and justice, are deducible from justification. Furthermore, some of the contractual doctrines are derived from two or more core-notions, such as unconscionability, inequality of bargaining power. The various relations between core-notions and sub-concepts determine the way that one theory distinguishes itself from another. We can have many different relations between them, but a theory of contract law must have a set of relatively comprehensive and coherent core-notions and sub-concepts, especially if it is to claim that it is an understanding of the very nature of contract law.

The relation between constant notions and variable notions. The four basic notions can be divided into two sorts: constants and variables. Voluntariness and legitimacy are constant while fairness and justification are variable. By calling the former ones constant, I mean that they are less flexible aspects of contract law. If there is change in these two notions, there will be a

quantitative change, i.e.the degree of voluntariness or the degree of complexity of legal procedures. There will no radical change in the two notions themselves, such as what would be necessary for conceiving that an involuntary transfer will be allowed, or that a contract could be enforced without any legal procedures. In contrast by calling the latter ones variable I mean that they are on-going elements of contract law. The contents of moral fairness and social justification vary from one historical period to another, and from one society to another. Hence, it may be said that there was some kind of quiet revolution concerning these two notions from the classical period to modern period. It is noted here that the variable notions definitely affect the constant notions, and their influences become the essential causes for the slow and evolutional change of the constant notions. At any rate, in a certain historical situation and society, fairness and justification obtain their definite meanings and become part of the sufficient conditions for contract law. In this respect, a theory serving the function of justification usually starts from the perspective of variable notions before extending itself to constant notions, whereas a theory whose purpose it is to be predictive tends to go from constant notions to variable notions. However, a relatively comprehensive and coherent theory should include these two kinds of notions and explore their

relations in one way or another.

The relation between basic notions and a holistic system. The relation between notion and system will be discussed along the lines of the following three aspects. First, the identity and existence of a notion are determined with reference to the whole system to which it belongs. That is to say, the meaning of a notion such as voluntariness could be explained and justified from different fields, i.e. economics, politics, etc., but its real meaning as a basic notion of a contract theory is determined by a given system which predetermines the validity of all references to these other areas. This is actually a requirement of coherence. One of the major problems for the law and economics school is that most economists and law professors under this approach simply adopt standard economic notions and apply them into the law of contract. As a consequence, the contract law in law economics school is conceptually different from the contract law viewed from lawyers and judges.

Second, the identity and existence of a system is determined by its basic notions and their relations. In other words, the comprehensiveness of a theory is determined by a given set of notions and their relations. A theory is incomplete if its basic notions and their relations have not been fully stated. Fried, for example, provides a moral justification for the notion of promise,

but he also wants to apply his justification to the entire area of contract law. In a consequence, as we have seen already, he has to narrow down the field of contract law: he abandons parts of contract law, and explains part of contract law in terms of "residual principles" rather than his original promise principle.[187]

Third, various theories of contract law are correspondent to the different dispositions of their basic notions and relations. Only when theories have equivalent basic notions, can they be comparable with each other, that is, when they provide different versions of the same text in a way which could be intelligibly discussed and debated in relation to other versions. Only when theories start with the four fundamental notions corresponding to basic elements of contract law, might they provide a relatively comprehensive understanding of the nature of contract law. Nevertheless, we could still have many different understandings of the nature of contract law if these theories were all based on these four basic notions. But in this case, their differences would exist in their distinct relations of basic notions, rather than in the ad hoc way they currently differentiate themselves.

4.3 Closing Reflection

During the last decade or so, the orthodox notion of

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[187] See chapter I, section 2 and acconpanying text.

"freedom of contract" has been confronted with a deep crisis, and legal positivism has been seriously challenged. Normative legal philosophy has reemerged and remains currently in vogue. Instead of discussing enacted statutes and the system of rules governing their enactment, these legal philosophers are re-evaluating the foundations of contract and the origin of the bindingness of contractual obligation. The central issue for them is what the underlying rationale behind contractual rules and doctrine is, and how law, morality, economics, and social ideology relate to each other.

Each approach to contemporary theory of contract law gives different responses to these two questions. One approach reinterprets the classical notion of a promise with reference to social rules, moral principles , and a theory of entitlement. The rationale underlying this approach is to build a relation between the internal notion of a promise and the external notions of morality, politics and sociality. Although contract law is still based on the notion of a promise, it can be fully understood only in terms of principles beyond the law itself. A second approach tries to connect contract law with neo-classical economics and liberalism. Contract law is essentially viewed as an instrument for maximizing economic efficiency and promoting liberal justice. In other words, the sense of what contract acts are is alienated to non-legal

explanations, such as economic or political activities. A third approach is to see contract law as pervasive, and extending throughout our social lives. It criticizes the underlying value and ideology of existing contract law, and reconstructs a new model of contract as a social constitution according to a new set of social values.

By examining these three approaches to contract law, I have tried to show: a normative movement from internal doctrine and notions of contract law to an external reason and principles beyond contract law; a movement from legal regulation to a social institution; and, a movement from the classical notion of laissez-faire to a modern value of communitarianism.

As indicated earier, though each of these theories contains insights that have contributed a better understanding of certain aspects of contract law, they have provided less satisfying answers about the nature of contract law in general.

Two major problems in the normative approach to contract law have been explored in this thesis. The first one is methodological, that is, each of these theories is based on but a subset of set of aspects requisite to a comprehensive understanding of contract law, and thus each interprets the whole complex institution of contract law and the general nature of contractual obligation only from but their own single perspective. The other one is quasi-

ontological, that is, contract law is explained or justified merely in terms of morality, economics, politics, and ideology. The intrinsic value of contract law itself is to a large extent ignored, and thus the law of contract loses its self-identity. As a consequence, while legal positivism describes contract law within the legal domain, normative legal philosophy goes to another extreme and prescribes for contract law conditions that are outside law proper.

In order to repair these deficiencies in contemporary theory of contract law, I proposed a tentative framework, within which the nature of contract law could be intelligibly discussed and might be comprehensively and coherently understood. The framework was presented through following two steps: a discussion of necessary conditions for a theory of contract law, and an attempt to articulate a model for the theory of contract law. The first condition is a comprehensive requirement, that is, if a theory of contract law is comprehensive, it must serves three theoretical functions: prediction, explanation, and justification. The second condition is a coherent requirement, that is, if a theory of contract law is coherent, it has to define a set of basic notions and their relations within a holistic system. Note that these two conditions were proposed as requirements for any theory of contract law, i.e. as a theory about the nature of contract

law, not a theory of a particular contractual rule or doctrine.

Following these two requirements, a comprehensive and coherent model of a theory of contract law was articulated. In this model I defined a set of basic notions according to a set of fundamental elements of our epistemic object--- contract law, and discussed their relations within a holistic system. Note that I had no intention to produce an overarching theory of contract law (I do not think that it is possible to have such a theory). This model was offered as an example of what is required a comprehensive and coherent theory of contract law. By virtue of this model, I intended to show that it is possible to overcome the dichotomy of legal form and substance, that there is hope to relieve the tension between legal positivism and legal normativism, and that in the end we might understand the basic nature of contract law more profoundly than before.

BIBLIOGRAPHY

Book:

Atiyah, P. S. Promise, Moral, and Law, Oxford: Clarendon Press, 1981.

Essay on Contract, Oxford: Clarendon Press, 1986.

The Introduction to the Law of Contract, The Second Edition, Oxford: Clarendon Press, 1971.

Bayefsky, Anne ed. Legal Theory Meets Legal Practice, Edmonton: Academic Printing & Publishing, 1988.

BonLour, Laurence The Structure of Empirical Knowledge, Cambridge, Mass.: Harvard University Press, 1985.

Collins, Hugh The Law of Contract, London: weidenfeld and Nicolson, 1986.

Corbin, Arthur Linton Corbin on Contract, vol.1, edn. St. Paul, Minn: West Publishing Co., 1952.

Dworkin, Ronald Taking Right Seriously, Cambridge: Harvard University Press, 1977.

Feiberg, Joel and Gross, Hyman ed. Philosophy and Law, The Third Edition, California, Belmont: Wedsworth Publishing Co. 1986.

Fifood and Furmston, Cheshire, Law of Contract, 11th. ed. London and Toroto: Butterworths, 1986.

Fried, Charls, Contract anas Promise, Cambridge, Mass.: Harvard University Press, 1981.

Gadamer, Hans-Geory, Truth and Method, Trans, by Garrett Barden and John Cumining, London: Sheed & Ward, 1975.

Gilmore, Grant The Death of Contract, Oxford:Clarendon Press, 1975.

Hart, H.L.A. The Concept of Law, Oxford: Clarendon Press, 1961.

Kronman, Anthony T. and Posner, Richard A. The Economics of Contract Law, Boston and Toronto: Little, Brown and Co., 1979.

Macneil, Ian R. The New Social Contract, New Harven and London: Yale University Press, 1980.

Major, W. T. The Law of Contract, 6th. ed. Macdonald and Evans, 1983.

Polinsky, A. Mitchell. An Introduction to Law and Economics, Boston and Toroto:Little, Brown and Company, 1983.

Posner Richard A. The Economics of Justice. Combridge: Harvard University Press, 1983.

Economics Analysis of Law. 2nd. edn. Boston: Little, Brown and Co., 1977.

Rawls, John A Theory of Justice, Cambridge: Harvard University Press, 1971.

Raz, Joseph Practical Reasons and Norms, London, 1975.

The Morality of Freedom, Oxford: Clarendon Press, 1986.

Simpson, Even ed. Anti-Foundationalism and Practical Reasonong, Alberta, Edmonton: Academic Printing & Publishing, 1987.

Ariticals:

Atiyah, P.S. "Contract, Promises and the Law of Obligations", Law Quarterly Review, vol.94, 1978, p.193

Barnett, Randy E. "Contract Scholarship and the Reemergence of Legal Philosophy". (Book Review), Harvard Law Review, Vol.97, 1984, p.1223.

"A Consent Theory of Contract". Columbia Law Review, Vol.86, 1986, p.169.

Barrister Interview with Duncan Kennedy. "Are Lawyers Really Necessary?" Barrister, Vol.14, 1987, p.11.

Barton, John H. "The Economic Basis of Damages for Breach of Contract". The Journal of Legal Studies, 1977, p.277.

Bayles, Michael D. "Legally Enforceable Commitments". Law and Philosophy, Vol.4, 1985, p.311.

Bayles, Michael D. "Introduction: The Purpose of Contract Law". Valparaiso University Law Review, Vol.17, 1983, p.613.

Beermann, Jack M. "Contract Law as a System of Value". Boston University Law Review, Vol.67, 1987, p.553.

Beynolds, F.M.B. "Review on the Law of Contract by H. Collins". The Law Quarterly Review, Vol.102, 1986, p.629.

Calabresi, G. and D. Melamed. "Property Rules, Liability Rules, and Inalienability". Harvard Law Review, Vol.85, 1972, p.1089.

Coleman, Jules L. "Economics and the Law: A Critical Review of the Foundation of the Economics Approach to Law". Ethics, July 1984, p.649.

"The Normative Basis of Economic Analysis: A Critical Review of Richard Posner's The Economics of Justice", New York University Law Review, Vol.59, p.410.

Collins, Hugh "Contract and Legal Theory" in Legal Theory and Common Law, Twining, W. ed. Oxford, 1986.

Dowd, Jennifer M. "Critical Legal Studies: Beyand Skeptical Jurisprudence", Journal of Comtenporary Law, vol.11, 1984, p.345.

Epstein, Richard A."Unconscionability: A Critical Reappraisal". The Journal of Law and Economics, Vol.18, 1975, p.293.

Feinman, Jay M. "Contract after The Fall". Stanford Law Review, Vol.39, 1987, p.1537.

Fridman, G.H.L. "On the Nature of Contract". Valparaiso University Law Review, Vol.17, 1983, p.627.

Gary, Minda. "The Lawyer-Economist at Chicago: Richard A. Posner and the Economic Analysis of Law". Ohio state Law Journal, Vol.39, p.439.

Goetz, Charles J. and Robert E. Scott. "Enforcing Promises: An Examination of the Basis of Contract". Yale Law Journal, Vol.89, 1980, p.1321.

Hammond, Peter J. "The Economics of Justice and the Criterion of Wealth Maximization". The Yale Law Journal, Vol.91, 1982, p.1475.

Husson, Christine A. Desan. "Expanding the Legal Vocabulary: The Challenge Posed by the Deconstruction and Defense of Law". The Yale Law Journal, Vol.95, No.969,1986.

Kennedy, Duncan. "Form and Substance in Private Law Adjudication". Harvard Law Review, Vol.89, 1976, p.1685.

"Distributivist and Paternalist Motives in Contract and Tort Law", Maryland Law Review, Vol.41, 1982, p.532.

Kronman, Anthony T. "Mistake, Disclosure, Information, and the Law of Contracts". The Journal of Legal Studies, vol.7, no.1, 1978.

"Contract Law and Distributive Justice". The Yale Law Journal, Vol.89,1980, p.472.

"Specific Performance". The University of Chicago Law Review, 1978, Vol.45, p.351.

"Paternalism and the Law of Contract", The Yale Law Journal vol.92, 1983, p.763

Krygier, Martin. "Critical Legal Studies and Social Theory --- A Response to Alan Hunt". Oxford Journal of Legal Studies, Vol.7, 1987

Levin, Joel and Banks Mcdowell. "The Balance Theory of Contracts". McGill Law Journal, Vol.29, 1983, p.25.

Lightsey, Wallace K. "A Critique of the Promise Model of Contract", William and Mary Law Review, Vol.26, 1984, p.45.

Mulloch, Philip. "The New Paradigm of Contract: A Hermeneutical Approach". Valparaiso University Law Review, Vol.17, 1983,

Ramsay, Jain. "Contract Law and Modern Society". Osgoode Hall Law Journal, Vol.24, No.2, 1986, p.499.

Rawls, John. "The Basic Structure As Subject". American Philosophical Quarterly, Vol.14, No.2, April 1977.

Raz, J. "Promises in Morality and Law" (book review), Harvard Law Review, vol. 95, 1982, p.916.

"Promises and Obligations", in Law, Morality and Society, ed. Raz and Hacker, Oxford, 1977, p.210.

"Legal Principles and the Limits of Law". Yale Law Journal, Vol.81, 1972, p.823.

Richard, Posner A. "The Economic Approach to Law". Texas Law Review, Vol.53, 1975, p.757.

Schwartz, Gary T. "Economics, Wealth Distribution and Justice". Wisconsin Law Review, 1979, p.799.

Shiner, Roger A. "Justice in the Garden of Eden". Philosophy 63, 1988

"Efficiency, Right and Unfair Dismissal, in Law and Econnmics, ed. by R. N. Moles. Stuttgart: Franz Steiner Verlag Wiesbarden Ginbh, 1988.

Swan, John "Whither Contracts: A Retropective and Perspective Overview", in Law in Transition: Contracts, Law Society of Upper Canada, 1984, p.125.

Unger, Roberto Mangabeira. "The Critical Legal Studies Movement". Harvard Law Review, Vol.96, No.3, January 1983.

Wang, William K.S. "Reflections on Contract Law and Distribution Justice: A Reply to Kronman". The Hasting Law Journal, Vol.34, 1982, p.513.